81-2257

No. _____

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lawrence Allen Katz
Susan Gaylord Gale
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees for tortious conduct occurring during a labor dispute unless the employer can demonstrate, to the satisfaction of an NLRB administrative law judge, that his suit has substantive merit and is not tainted by improper motivation?

2. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees when the suit is not based upon employee resort to the Board or upon issues pending before the Board or subject to Board jurisdiction?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties appearing in the caption of this case were the only parties to the proceedings in the Ninth Circuit.[1]

---

[1] The petitioner is challenging the NLRB's order requiring it to terminate a state court suit against certain individuals. The defendants in that litigation thus have an interest in the outcome of this Petition. Their names are Ruth Helton, John Helton, Barbara Orr, Lawrence Orr, Cheryl Nichols, Carl Nichols, Carla Scott, Debra Mackie, and Dale Michaud. Their attorney is Michael J. Keenan, 316 West McDowell, Phoenix, Arizona 85003.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
List of Parties to the Proceeding Below	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	1
Reasons for Granting the Writ	4
A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Regarding The Appropriate Test For The Lawfulness Of An Employer Suit Against Employees	4
B. The Ruling Below Conflicts With Decisions Of This Court Which Have Reserved Certain Responsibilities To State Courts During Labor Disputes	7
C. The Anti-Injunction Act Bars The NLRB From Enjoining Civil Actions In State Courts Under The Circumstances Of This Case.	10
D. The Decision Below Will Confuse State and Federal Relationships And Disturb The Balance Between The Rights Of Employers And The Protection Of Employees	11
Conclusion	13
Appendix:	
Statutes: 28 U.S.C. § 2283	A-1
29 U.S.C. § 158(a)(1)	A-1
29 U.S.C. § 158(a)(3)	A-1
29 U.S.C. § 158(a)(4)	A-2
Decision of the Ninth Circuit Court of Appeals	A-3
Decision and Order of the National Labor Relations Board	A-14
Decision of the Administrative Law Judge	A-19

TABLE OF AUTHORITIES

Cases	PAGE
Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942)	7
Associated General Contractors v. NLRB, 637 F.2d 556 (8th Cir. 1980)	6
Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	10
Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954)	9, 11
Clyde Taylor Co., 127 N.L.R.B. 103 (1960)	6
Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977)	7
Giant Food Markets, Inc., 241 N.L.R.B. 727, *enf'd*, 633 F.2d 18 (6th Cir. 1980)	7
Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966)	7, 8, 9
Lodge 743, IAMAW v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976)	6, 9
NLRB v. Nash-Finch Co., 404 U.S. 138 (1971)	11
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)	8
Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979)	5, 6
Price v. Bill Johnson's Restaurants, Inc., Civil No. 78-830, Jan. 22, 1979 (D. Ariz.) (per Craig, J.)	12
S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977)	7
Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978)	7, 9, 10, 13
Television Wisconsin, Inc., 224 N.L.R.B. 722 (1976)	7
United Aircraft Corp., 192 N.L.R.B. 382 (1972), *mod.*, 534 F.2d 422 (2d Cir. 1975)	6
United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954)	7
United Credit Bureau of America, Inc. v. NLRB, 643 F.2d 1017 (4th Cir.), *cert. denied*, 70 L. Ed. 2d 404 (1981)	5, 6, 9

United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977), *enf'd*, 601 F.2d 980 (9th Cir. 1979) 6

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2283 ..... 1, 10, 11
29 U.S.C. § 158(a)(1) 1, 2, 3
29 U.S.C. § 158(a)(3) 1
29 U.S.C. § 158(a)(4) 1, 2, 3
29 U.S.C. § 160(f) 3

OPINIONS BELOW

The opinion of the Court of Appeals was reported at 660 F.2d 1335. The opinion of the National Labor Relations Board was reported at 249 N.L.R.B. 155. A copy of each opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 12, 1981. A petition for rehearing was denied on March 2, 1982. This Petition for Certiorari was filed within 90 days of that denial. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are: 28 U.S.C. § 2283, and 29 U.S.C. §§ 158(a)(1), (3) and (4). The text of these statutes is set out in the Appendix hereto.

STATEMENT OF THE CASE

On August 8, 1978, Bill Johnson's Restaurants, Inc. (hereinafter "the Restaurant"), discharged Ruth Helton, one of its waitresses. She then filed a charge with the National Labor Relations Board (hereinafter "the Board" or "the NLRB"), alleging that she had been discharged for engaging in union organizational activity. On September 20, 1978, the NLRB Regional Director issued a complaint based on Helton's charge, alleging that her termination constituted an unfair labor practice under Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter "the Act" or "the NLRA"), 29 U.S.C. §§ 158(a)(1), (3).

That same day, Helton and a number of her supporters, together with their spouses, friends and children, began picketing in front of the Restaurant, including walking back and forth across the Restaurant's two driveways. 660 F.2d at 1339.

On the third consecutive day of picketing, the demonstrators passed out leaflets to Restaurant customers and passersby which asserted, among other things, that the Board had issued a complaint against the Restaurant for unfair labor practices, that Helton had been discharged because of her union activity, and that waitresses

at the Restaurant were denied proper overtime pay, were subjected to "unwarranted sexual advances" and were compelled to use a "filthy restroom . . . with no soap, paper towels or toilet tissue provided." 660 F.2d at 1339-40. A number of waitress complaints against management were listed on the leaflet in a "somewhat ambiguous" manner, indicating, erroneously, that the NLRB had accused the Restaurant of *several* unfair labor practices. 660 F.2d at 1343.

Three days later, on September 25, 1978, the Restaurant filed a civil complaint in Arizona state court against the demonstrators, alleging that they had unlawfully interfered with the Restaurant's business operations, had published libelous statements in their leaflet, and were creating a threat to public safety. The complaint sought (a) an injunction against mass picketing, violence, trespass, and obstruction of Restaurant driveways, (b) an injunction against the continued publication of libelous statements and leaflets, and (c) compensation for the damages suffered as a result of these unlawful acts. The complaint was accompanied by an application for a temporary restraining order.

Following a hearing at which three of the demonstrators testified, the state court judge issued a temporary restraining order prohibiting trespass, violence or threats of violence, interference with the ingress and egress of Restaurant customers, and the use of more than four demonstrators in front of the Restaurant at any one time. The judge declined to extend the temporary restraining order to the alleged libel, but did set a date for hearing on the Restaurant's application for a preliminary injunction and did sign an order allowing expedited discovery in preparation for that hearing.

The day after the lawsuit was filed, Ruth Helton filed a second charge with the Board, alleging that the Restaurant's lawsuit constituted an unfair labor practice. Thereafter, the Board issued a second complaint, asserting that the Restaurant's filing and prosecution of its civil lawsuit (1) violated Section 8(a)(4) of the Act because it discriminated against employees for filing charges or giving testimony to the Board, and (2) violated Section 8(a)(1) of the Act because it interfered with, restrained or coerced employees in the exercise of their rights under the Act.

On October 27, 1978, the NLRB filed a petition in federal district court in Phoenix, seeking an injunction requiring the Restaurant to withdraw its state suit. The petition alleged that the state court action filed by the Restaurant was "coercive," was intended

to discourage employee resort to the Board, and was filed in retaliation for employee participation in protected activities. Following a hearing on November 1, 1978, District Judge Walter E. Craig entered a formal order denying the General Counsel's request for an injunction and specifically finding: (1) that the NLRB had no reasonable cause to believe that the Restaurant had filed its state court action for a coercive or discriminatory purpose or had intended to interfere with NLRB procedures, and (2) that the Restaurant's lawsuit demonstrated, on its face, that it was filed for lawful objectives. See footnote 6, page 12 *infra*.

Hearings on the two NLRB Complaints were held before an administrative law judge (hereinafter "the ALJ") in December 1978. While the ALJ was considering his decision, the defendants in the state court suit moved for summary judgment on the Restaurant's complaint. All parties submitted affidavits and briefs, and a hearing was held. On March 13, 1979, the state court judge granted the motion with respect to the business interference claims but denied summary judgment on the Restaurant's libel suit. Six months later, the ALJ rendered his decision, ruling that Helton had been discharged for her union activities, that the Restaurant's suit had insufficient factual support, and that the suit had been motivated by a desire to coerce and intimidate employees engaged in protected activity, in violation of Sections 8(a)(1) and (4) of the Act. His order required the Restaurant to withdraw the complaint it had filed in state court, and to reimburse the defendants named in that action for all legal expenses incurred in their defense of that suit, including expenses incurred in the prosecution of counterclaims which the defendants had filed.

The Restaurant thereafter submitted to the NLRB numerous exceptions to the ALJ's ruling. On April 28, 1980, the NLRB rendered its decision, which affirmed the ALJ's ruling with only minor modifications.

On May 20, 1980, the Restaurant petitioned the United States Court of Appeals for the Ninth Circuit to review and set aside the Board order. The NLRB thereafter filed a cross-application for enforcement of its order. The Ninth Circuit had jurisdiction of the appeal pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f). Oral argument was held on April 15, 1981. In its decision dated November 12, 1981, the Ninth Circuit ordered enforcement of the Board's order in its entirety. The Restaurant filed a Petition for Rehearing which was denied on March 2, 1982. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals Regarding The Appropriate Test For The Lawfulness Of An Employer Suit Against Employees.

The decision of the Ninth Circuit in this case represents the only occasion on which a Federal Court of Appeals has held that an employer's civil lawsuit against his employees violated the National Labor Relations Act despite the fact that the suit had a lawful objective on its face, was not based upon the defendant's utilization of Board procedures, and was not preempted by the NLRA. In a significant expansion of NLRB authority, the Ninth Circuit has ruled that the Board may compel an employer to terminate an otherwise proper state court lawsuit based upon (a) that agency's evaluation of the ultimate merits of the case, and (b) the agency's subjective determination of the plaintiff's "true" motivation for filing the action. Such a premise, if approved, will compel many employer plaintiffs to submit the merits of their lawsuits to an administrative law judge ("ALJ"), instead of to a state court judge, without benefit of discovery, preliminary motions, standard rules of evidence, or a civil judge and jury, on penalty of having their suits dismissed by the ALJ and an award of attorneys' fees entered against them if they fail to prove their case or the propriety of their motivation for suit.

The Ninth Circuit's holding that the NLRB may examine the merits of an employer's civil action and his motivation for suit places a harsh and unreasonable burden upon the state court litigant whose suit is challenged before the NLRB. Although the Ninth Circuit did state that the plaintiff need demonstrate only that "his claim is a colorable one" and has a "reasonable basis" (660 F.2d at 1342), it is obvious that a harsher test was in fact imposed. This conclusion is based upon: (1) the Ninth Circuit's unwillingness to hold that the Restaurant had demonstrated a "colorable" libel claim by introducing the demonstrators' leaflet proclaiming "filthy restrooms," "unwarranted sexual advances," and a refusal to pay lawful overtime compensation; (2) the court's refusal to acknowledge factual support for the Restaurant's libel suit in the face of the state court's ruling that the existence of factual issues precluded summary judgment for the defendants; (3) the Ninth Circuit's failure to find that "a reasonable basis" for the Restaurant's prayer for injunctive relief was demonstrated by the state court's decision, *after hearing*, to issue a restraining order against trespass, mass picketing, and improper interference with business; and (4) the Ninth Circuit's invalidation of the employer's suit even though it found that the

"civil lawsuit had a lawful objective on its face," and "sought relief for alleged wrongs that the state court could remedy." 660 F.2d at 1342. In compelling an employer to establish, to the satisfaction of an ALJ, that his civil action has substantive merit and that his motivation for suit is untainted, the Ninth Circuit has substantially departed from the standards applied by other Circuits.

In *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979), *denying enforcement to* 239 N.L.R.B. 445 (1978), for example, the Seventh Circuit held that as long as the employer's lawsuit has a "reasonable basis," it is not an unfair labor practice. In that case, the employer brought a civil action, alleging harassment, against an employee who had filed a charge against him with the NLRB and with the Occupational Safety and Health Administration ("OSHA"). The Seventh Circuit did not seek to determine whether the employee's NLRB and OSHA charges would support an action for harassment under state law; nor did the Seventh Circuit examine the employer's motive for filing suit. The employer's suit was found to have a "reasonable basis" — and thus not to constitute an unfair labor practice — merely by virtue of the fact that the defendant employee had a history of filing baseless charges against other employers and labor organizations. In contrast, the Ninth Circuit in the instant case was not willing to find a "reasonable basis" to the employer's suit on the grounds that the statements in the challenged leaflet, if false and published with malice, would constitute actionable libel and that the demonstrations, if expanded or disorderly, would improperly interfere with the employer's business. Instead, the Ninth Circuit, in conflict with the standard applied by the Seventh Circuit, improperly allowed the Board to evaluate the underlying motivation for the employer's litigation and to usurp the function of the state court by determining the substantive merit to the employer's judicial complaint.[2]

Power Systems is generally in accord with the more recent case of *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017

---

[2] The contrast between the standards applied by the Ninth and Seventh Circuits is further highlighted by the fact that the Board itself made the same findings in *Power Systems* that it made in *Bill Johnson's Restaurants — i.e.*, that the challenged conduct of the employee was reasonable and thus protected, that there was no evidence to support the employer's civil action, and that the motivation for suit was to penalize the defendant for protected activity. *See* 239 N.L.R.B. at 448; 249 N.L.R.B. at 164, 165.

(4th Cir.), *cert. denied*, 70 L. Ed. 2d 404 (1981). In that case, the Fourth Circuit found that an employer had committed an unfair labor practice by suing an employee for filing an NLRB charge. Unlike *Power Systems*, however, the employee had no history of frivolous claims. *United Credit Bureau* is the only appellate decision, other than the Ninth Circuit's ruling in the instant case, to hold an employer's civil suit against an employee to be an unfair labor practice. The Fourth Circuit's decision, though cited by the Ninth Circuit as supporting judicial review of an employer's "anti-union motive" for suit (660 F.2d at 1342-43), did not require an examination of the merits of the employer's suit or of his underlying motivation. Rather, that decision was based entirely on the content of the employer's state court complaint, which alleged that the defendant employee's resort to the Board was part of a fraudulent scheme.

Other appellate courts have indicated uncertainty as to reliance upon a motivation test in evaluating the propriety of an employer's suit. The Second Circuit, for example, has held that even if an employer, in filing suit against his employees, is "improperly motivated . . . , this alone would not make resort to the courts unlawful so as to justify an unfair labor practice finding." *Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). On the other hand, the Eighth Circuit recently declared that, although "the requirement of good faith has been diminished . . . , we do not believe that the requirement of looking into the union's or employer's purpose or motivation in the filing of a lawsuit has been abolished." *Associated General Contractors v. NLRB*, 637 F.2d 556, 561 (8th Cir. 1980).[3]

---

[3] The decisions of the NLRB itself also evidence the confusion and lack of direction which exist with respect to the appropriate test for determining the legality under the NLRA of an employer's lawsuit against his employees. In the pivotal case of *Clyde Taylor Co.*, 127 N.L.R.B. 103, 109 (1960), the Board declared that it would not interfere with the employer's right to file suit in state court even though that suit was "part of a bad-faith scheme to defeat union organization." Eleven years later, in *United Aircraft Corp.*, 192 N.L.R.B. 382, 384 (1971), *mod.*, 534 F.2d 422 (2d Cir. 1975), the Board reconfirmed the *Clyde Taylor* rule that "the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." Thereafter, an exception to this rule was recognized where the object of the litigation was itself unlawful, such as enforcement of a hot-cargo or invalid union security clause. *See, e.g., United Stanford Employees, Local 680*, 232 N.L.R.B. 326 (1977), *enf'd*, 601 F.2d 980 (9th Cir. 1979). But the Board focused upon the plaintiff's declared objective for suit, as stated in

The Ninth Circuit has seriously departed from the rationale of the decisions rendered by the Second, Fourth and Seventh Circuits by upholding the NLRB's requirement that the employer prove the allegations of his civil suit to the satisfaction of an ALJ and demonstrate "proper" motivation for the suit. These conflicts among the Courts of Appeals, and the apparent confusion regarding the standard against which to measure the legality under the NLRA of an employer's civil suit against his employees, can, and hopefully will, be resolved by this Court.

B. The Ruling Below Conflicts With Decisions Of This Court Which Have Reserved Certain Responsibilities To State Courts During Labor Disputes.

This Court has had many occasions to defend litigants' rights to seek local judicial protection from tortious conduct during a labor dispute. *See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (trespass); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (libel); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) (interference with business); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942) (mass picketing). In all these cases, this Court has emphasized the necessity of allowing state courts to rule upon matters of substantial local concern, even though other elements of the underlying labor dispute might be subject to NLRB jurisdiction.

In its opinion below, the Ninth Circuit acknowledged that the NLRA does not preempt state court jurisdiction over actions for libel arising in a labor context, as long as the plaintiff can establish

---

the complaint, not his perceived ulterior motive. Thus, in *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 722 n.2 (1976), the Board held that a union's lawsuit was improper "not because of the Union's subjective intent but because of the unlawful objective sought by the Union." Until the instant case, the Board restrained itself from intruding unnecessarily into the parties' civil litigation. For example, in *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), the Board ruled that no unfair labor practice had been committed by an employer who had filed a $50,000 libel suit against an employee, despite a finding that there was no basis to the libel claim. And in *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, *enf'd*, 633 F.2d 18 (6th Cir. 1980), the Board found that an employer's lawsuit to enjoin peaceful picketing was not an unfair labor practice. The Board's radical departure from its own precedents in the instant case indicates the need for Supreme Court review.

malice. 660 F.2d at 1344. *See Linn v. United Plant Guard Workers, Local 114, supra.* However, the Ninth Circuit then proceeded to effectively nullify this Court's decision in *Linn* by holding that the plaintiff in the libel action may be denied an opportunity to prove his allegations in the state court proceeding unless he can first prove them to the satisfaction of an NLRB administrative law judge — despite severely limited discovery which impedes a plaintiff's ability to develop evidence that the offensive statements were published with knowledge of their falsity or with reckless disregard for the truth, as required by *Linn*. 383 U.S. at 64-65. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). If the ALJ, who is unlikely to possess expertise in the law of libel, determines that the employer has failed to present sufficient evidence to support his allegations, he may then, under the Ninth Circuit's ruling, order the civil proceeding dismissed.

This result and the procedure established by the Ninth Circuit are directly contrary to this Court's decision in *Linn*, which confirmed the state court's authority to determine the merits of a cause of action for defamation arising during a labor dispute. In the instant case, the Ninth Circuit expressed concern that the boundary between state and federal interests will be "hopelessly obscured" if a state court libel action arising out of a labor dispute is sustainable merely by virtue of the inclusion of allegations of malice in the complaint. 660 F.2d at 1344. In *Linn*, however, this Court specifically considered, and alleviated, that fear by requiring the state court to dismiss the complaint unless the plaintiff can *prove* his allegations of malice. 383 U.S. at 64-65. The impact of the Ninth Circuit's decision will be to substitute the ALJ for the state court judge as the evaluator of such proof, thereby (1) denying the employer the judicial benefits of a jury, discovery, motions, and strict rules of evidence, as well as the substantive expertise of the civil judge, and (2) denying the state court the ability to regulate a matter of particular local concern. The decision below enables the employee defendant to avoid state court proceedings and to compel the employer plaintiff to establish his claim in more onerous circumstances merely by filing a charge with the NLRB alleging that the suit was coercive.

It is the Ninth Circuit, we submit, which has misunderstood, and "hopelessly obscured," this Court's allocation of NLRB and state court responsibilities in labor disputes. For example, although the Ninth Circuit recognized that the state court is competent to decide the merits of an employer's libel suit, it also held that "the same determination . . . is one which the Board must make to decide whether filing the libel suit was an unfair labor practice." 660 F.2d

at 1344. Thus, according to the Ninth Circuit, once the Board "has actually decided the issue," that "would appear to preempt further action by the state court." *Id.* Under *Linn* and related cases, however, the NLRB, which does *not* have jurisdiction over libel claims, is *not* required, in deciding if a libel suit constitutes an unfair labor practice, to make "the same determination" as the court in which the suit was filed. The state court must determine, by a preponderance of the evidence, whether the employer can *substantiate* his allegations. The Board need determine only whether the employer's civil complaint *alleges* a cause of action which is not (a) preempted by the NLRA, (b) dependent upon issues then pending before, or submissible to, the Board, or (c) based upon employee resort to Board procedures. *See Capital Service, Inc. v. NLRB*, 347 U.S. 501, 503-04 (1954); *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017, 1026 (4th Cir.), *cert. denied*, 70 L. Ed 2d 404 (1981). If the employer's suit survives this three-pronged test, there is no justification for the Board's intrusion into the local judicial process. Ample state remedies, in the form of malicious prosecution and abuse of process actions, or awards of attorneys' fees or punitive damages, exist where an employer files a groundless and improper suit. *See Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

The Ninth Circuit's decision also conflicts with guidelines provided by this Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). In that case, the Court held that Sears' trespass suit in state court was not preempted by the NLRA even though the company sought to enjoin picketing which was arguably protected by the Act. In so ruling, the Court cited a number of prior decisions in which it had identified compelling local interests warranting a finding of non-preemption. The Court noted that a common denominator in these cases was that "the conduct giving rise to the state cause of action (*e.g.*, violence, libel, or intentional infliction of emotional distress), if proved, would not be protected by § 7 of the NLRA, and therefore there existed no risk that state regulation of the conduct *alleged in the complaint* would result in prohibition of conduct protected by the federal Act." 436 U.S. at 196 n.25 (emphasis in original). Similarly, state regulation of the conduct alleged in the Restaurant's complaint — trespass, mass picketing, and libel — would in no way prohibit activity protected by the Act.

In holding that Sears' resort to the state court was not preempted by the NLRA, this Court pointed out that Sears had only three options to exercise in the face of the union's picketing: It could

permit the pickets to remain on its property; it could forcefully evict them; or it could seek protection under the state's trespass laws. Sears selected the third option, and this Court approved, finding that, "only by proceeding in state court . . . could Sears obtain an orderly resolution of the question whether the Union had a federal right to remain on its property." 436 U.S. at 202.[4] The Restaurant faced a similar selection of options when demonstrators were distributing offensive leaflets on the sidewalk in front of its premises in September 1978. The option chosen by the Restaurant — seeking an orderly judicial resolution of the parties' rights — was consistent with this Court's holding in *Sears*. The Ninth Circuit's condemnation of that approach was inconsistent with *Sears*.

C. The Anti-Injunction Act Bars The NLRB From Enjoining Civil Actions In State Courts Under The Circumstances Of This Case.

Since 1793, the Anti-Injunction Act, 28 U.S.C. § 2283, has prohibited federal courts from enjoining state court proceedings unless the injunction may be justified by one of three statutory exceptions.[5] The rationale for the statute is based on the "essentially federal nature of our national government," and the desire to prevent needless friction between the state and federal court systems by clearly delineating the proper boundaries within which each system may function. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). Interference in the workings of a state court is no less abhorrent to this principle of federalism if the interference comes from a federal agency rather than from a federal court.

---

[4] The Court nowhere suggested that Sears' suit would be proper only if its motivation was untainted, and Sears might well have been motivated by a desire to hinder the employees' organizational efforts. The picketing, which had been "peaceful and orderly," became ineffective when, by state court order, it was removed from Sears' property to the public sidewalks. 436 U.S. at 182-83, n.2. See Section "A", *supra*.

[5] The full text of the statute reads as follows:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

In its decision below, the Ninth Circuit disposed of the Anti-Injunction Act in one short paragraph, citing, for its belief that the Act does not bar an injunction in this matter, the rulings in *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), and in *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971). Both are distinguishable from the instant case: In *Capital Service*, this Court held that the NLRB was not barred by Section 2283 from enjoining state court proceedings whose subject matter was then pending before the Board; in *Nash-Finch* this Court concluded that the NLRB may obtain an injunction against state court proceedings "where its federal power pre-empts the field." 404 U.S. at 144. In the instant case, the subject matter of the state lawsuit — libel, trespass, and improper interference with business — was neither pending before the Board nor subject to its jurisdiction. Therefore the rationale of *Nash-Finch* and *Capital Service* is not applicable here, and the Board's injunction was issued in violation of 28 U.S.C. § 2283.

D. The Decision Below Will Confuse State And Federal Relationships And Disturb The Balance Between The Rights Of Employers And The Protection Of Employees.

The decision below threatens a substantial disruption to the appropriate balances between state court and NLRB jurisdiction and between employer and employee rights. The Petitioner briefly notes the following undesirable consequences of the Ninth Circuit decision:

1. The Ninth Circuit affirmed the Board's order that the employer pay all legal expenses incurred by the demonstrators as a result of the civil suit, including expenses incurred in relation to the defendants' counterclaims (for libel, slander, malicious prosecution, and abuse of process). However, the state court ruled *against* the defendants on some of their counterclaims and set others down for trial. The litigation is still pending. If the state court defendants ultimately prevail on the merits of their counterclaims, they may certainly apply to the court for recovery of their costs and attorneys' fees. There is no justification, however, for requiring the employer to pay fees and costs which the defendants incur in prosecuting *meritless* counterclaims. This is an example of the extent of the Board's unwarranted intrusion into the local judicial process.

2. The decision below may lead to conflicts among the federal appellate courts, the NLRB, and the state courts regarding the merits of an employer's civil suit. The Ninth Circuit ruled that the employer who sues his employees must, when challenged by the NLRB,

produce evidence "making his claim a colorable one," 660 F.2d at 1342, and both the Court of Appeals and the Board found that the Restaurant's causes of action for mass picketing, trespass and libel lacked such a basis. The state court, however, clearly did not agree: First, it entered a temporary restraining order against mass picketing and trespass after a hearing at which three of the demonstrators testified, and second, it denied the demonstrators' motion for summary judgment on the Restaurant's cause of action for libel.[6] It is the state judge, not the NLRB administrative law judge, whose expertise in the areas of libel, trespass and tortious interference with business warrants deference.

3. The result of the decision below, if allowed to stand, will be that an employee may substantially limit an employer's ability to discover evidence relevant to a civil lawsuit simply by filing an unfair labor practice charge with the Board and thereby obtaining the umbrella of that agency in avoiding discovery. Furthermore, filing such a charge may allow the employee defendant to avoid state proceedings entirely and to obtain an NLRB trial of the merits of the state action, under circumstances more onerous to the employer.

4. The Ninth Circuit's decision has given an undue advantage, approaching an immunity, to picketing employees. Since any legal action taken by an employer in such circumstances will appear to be retaliatory, an employer who is confronted with mass picketing, trespass, libel, slander, business disparagement, threats of violence or other torts normally subject to state court jurisdiction, may well be reluctant, in the face of the decision below, to seek appropriate and swift state court relief, for fear that he could be required to pay legal expenses incurred by the demonstrators in defending his suit and in asserting any counterclaims. Faced with such a possibility, an employer who does not have the luxury of time to analyze the legal niceties of the situation may turn instead to self-help (such as physical force) to restrain the demonstrators' excesses. This Court,

---

[6] In addition, a federal district court judge denied the Board's application for preliminary injunctive relief against the Restaurant's civil suit based on his finding that the Board "had no reasonable cause to believe that Respondent filed its lawsuit in the state court for a coercive or discriminatory purpose within the meaning of the Act, or that in so doing Respondent intended to interfere with the NLRB processes." *Price v. Bill Johnson's Restaurants, Inc.*, Civil No. 78-830, Jan. 22, 1979 (D. Ariz.) (per Craig, J.).

recognizing this possibility, has emphasized the need for unrestricted employer access to state courts in such situations. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978).

CONCLUSION

Due to the conflict among the Circuits on these issues, and the Ninth Circuit's deviation from standards and rulings established by this Court, we respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Lawrence Allen Katz
Susan Gaylord Gale
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999
Counsel for Petitioner

APPENDIX

STATUTES

28 U.S.C 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

29 U.S.C 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the pe-

riodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. . . .

Appendix A-3

OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

[Caption deleted]

Before GOODWIN and CANBY, Circuit Judges, and BYRNE,* District Judge.

CANBY, Circuit Judge:

On April 30, 1980, the National Labor Relations Board affirmed a ruling by an administrative law judge that appellant Bill Johnson's Restaurants had committed unfair labor practices by discharging a waitress, interrogating other employees, and by threatening reprisals against and filing and prosecuting a state court lawsuit against picketers who were protesting unfair labor practices. The Board ordered the restaurant to reinstate the discharged waitress, with back pay, to reinstate the three other waitresses who went on strike and to withdraw the lawsuit from state court. The restaurant seeks review of the Board's order under section 10(f) of the National Labor Relations Act, 29 U.S.C § 160(f). The Board cross-petitions for enforcement. We enforce the order of the Board.

FACTS

The following facts were found by the administrative law judge and affirmed by the Board. In February 1972, Ruth Helton began working at Bill Johnson's Big Apple East, one of four restaurants owned and operated by Bill Johnson's Restaurants, Inc., in the Phoenix, Arizona, metropolitan area. The corporation is owned by the Johnson family. By summer 1978, Helton was one of the two most senior waitresses at the restaurant; since 1977 she had received an hourly bonus, and she served on the breakfast shift, which because of the hours and tips was the most desirable shift at the restaurant.

On July 25, 1978, Vice President Johnny Johnson called a meeting of employees to announce a new policy of strict enforcement of company rules. Among other things, Johnson told the waitresses that they must call in on days off, and that they could not chew gum while working or use the business phone for personal calls. Johnson ended by stating that any waitress who broke company

---

* Honorable William M. Byrne, United States District Judge for the Central District of California, sitting by designation.

rules would be fired. The next day, a waitress on the breakfast shift who had not attended the meeting asked her supervisor, Suzie Gay, what had happened. Gay answered, "Nothing pertaining to the breakfast girls." The breakfast waitresses, as the most senior employees, had traditionally been excepted from some company rules. For example, they were not required to call in on days off, and they had been allowed to use the business phone for personal calls.

In the days after the speech, the waitresses discussed it extensively. Several waitresses agreed with Helton's suggestion that they needed a union to represent them. Discussions of unionization were held in the waitresses' lounge, at a nearby hotel, at a party where Supervisor Gay was present for at least part of the discussion, and in the restaurant during a coffee break while Gay was nearby.

On August 8, Helton worked her regular shift and went home. That afternoon, Gay called her and told her that she was fired. Helton asked why, and Gay answered that Johnny Johnson had not liked a question she had asked at the July 25 meeting. (Helton had asked only whether waitresses could sell customers a single pancake or had to sell orders of two.) Gay said also that Johnson did not like Helton's attitude. Helton asked for a written explanation, but Gay said that the restaurant was not required to give her one. On August 9, Helton filed a charge with the NLRB.

The day after Helton's discharge, Dirkson, a hostess, told Gay that all the waitresses thought Helton had been treated unfairly. Gay said that she didn't like firing Helton, but that "Ruth had been antagonizing the girls on the floor" and that she couldn't "run a shift with that type of friction." She then asked whether Dirkson knew "if Ruth had any contact with any of the girls." A few days later, after learning that Helton had filed a charge with the NLRB, Gay asked Dirkson if any other waitresses had been talking about the union.

On September 18, waitresses Nichols, Scott, and Michaud walked out of the restaurant without explanation. On the way out, they turned their checkpads in to the cashier. The cashier reported their leaving to Manager Lois Williams. That afternoon, the waitresses returned to fill out their tip reports. Williams told them that they could pick up their checks the next day. When Manager Sherry Sturgeon asked the waitresses why they had walked out, they responded that they thought Helton was fired unjustly, and complained about the treatment they had received since the July 25 meeting. Sturgeon told the waitresses that they could forget what Johnny Johnson had said at the meeting because she was back in charge

after her vacation. During the conversation, Scott stated that she was tired of waitressing. Nichols complained that her daily commute was too long. At no time did the waitresses say that they had quit their jobs, but Sturgeon told them to pick up their checks the following day.

On September 20, the Board issued a complaint against the restaurant, and the three waitresses joined Helton and a few others to picket the restaurant. Their picket signs said that the restaurant had been accused of unfair labor practices and asked the public to boycott the restaurant. The picketers walked along the sidewalk in front of the restaurant. Although they crossed two driveways which led to the restaurant parking lot, they did not block public access to the lots. At no time were there more than seven adults and two children picketing. That day, Sturgeon confronted the picketers and took down their names. She said, "You might think you're funny, but I intend to have the last laugh. I will get even with you for what you're doing." She told Helton that "I'll get even with you if it's the last thing I do." That afternoon, Gene Johnson telephoned waitress Cheryl Nichols and asked to talk with her husband. Johnson asked Carl Nichols why they had been picketing the restaurant. Carl said that they were protesting Helton's discharge. Then Johnson said that she would hate to see the Nichols lose their new home, and also that she would hate to see them "get hurt by all this."

On September 21 and 22, the picketing continued. On September 22, the picketers distributed a leaflet to the public. The leaflet stated:

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT . . . FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by [Ruth] Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> - Eight hour shifts with no specified breaks.
> - No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.

- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, the restaurant filed a civil complaint in state court. The complaint alleged that the picketers had engaged in mass picketing, blocked public access to the restaurant, and created a threat to public safety. The complaint also alleged that the picketers had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the NLRB." The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the picketers from trespassing, mass picketing, violence, interfering with the restaurant's business operations, and publishing false and misleading statements about the restaurant and its management. That same day, the court issued a temporary restraining order granting most of the relief requested, and setting an October 5 hearing to consider the request for a preliminary injunction.

On September 26, the picketing continued, and Helton hired an attorney to represent her. On October 2, the restaurant's attorney deposed Helton, asking numerous questions about the nature and extent of Helton's union activities, the identities of other employees involved in union activities, and the extent of management's knowledge of these activities. On November 16, the state court denied the restaurant's request for a preliminary injunction. The suit for a permanent injunction and damages is still pending.

HELTON'S DISCHARGE

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(3), 29 U.S.C. § 158(a)(1) and (a)(3), by discharging Helton for engaging in union activity. The Board ordered reinstatement and back pay. Under section 8(a)(3), the test is whether the union activity was the moving cause behind the employee's discharge. *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341-42 (9th Cir. 1980). The determination of motive is particularly within the Board's area of expertise. *Pay'n Save Corp. v. NLRB*,

641 F.2d 697, 702 (9th Cir. 1981); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 600 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). An employer may not use a business reason as a pretext for a discharge which is motivated by anti-union animus. *L'Eggs Products, Inc. v. NLRB*, 619 F.2d at 1341. The Board need not credit an employer's self-serving statement that an employee was discharged for cause. *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d at 600. If the Board's findings and inferences are reasonable and supported by substantial evidence, they must be affirmed. *Pay'n Save Corp. v. NLRB*, 641 F.2d at 702; *NLRB v. Silver Spur Casino*, 623 F.2d 571, 585 (9th Cir. 1980), *cert. denied*, 451 U.S. 906, 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981).

In this case, the restaurant argues that it fired Helton for rules violations. The Board found that this reason was a pretext, and concluded that Helton was fired for engaging in union activity. This finding is supported by substantial evidence. Helton was a senior waitress, one of two waitresses who received a bonus. She had not previously been reprimanded for rules violations. Gay specifically told another breakfast waitress after the July 25 meeting that the rules did not apply to the breakfast shift, and none of the breakfast waitresses was required to call in on days off until Helton was fired. Other waitresses who broke the rules were reprimanded, not fired. The timing of Helton's discharge, the restaurant's leniency in enforcing rules violations of other waitresses, and the absence of reprimands on Helton's record all support the conclusion that she was fired for union activity. *See NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978).

The restaurant argues, however, that the evidence does not show that the restaurant management knew about Helton's union activities, and that without such knowledge, there can be no section 8(a)(3) violation. We conclude that there is substantial evidence to support the finding that the restaurant management knew about Helton's union activities. An employer's knowledge of union activity may be inferred from circumstantial evidence. *Famet, Inc. v. NLRB*, 490 F.2d 293, 295-96 (9th Cir. 1973). Because of the small number of employees who worked in the restaurant (40 waitresses total) and the close-knit, family management team, it is reasonable to infer that the management knew of Helton's efforts to organize a union. *Id.* After the July 25 meeting, the waitresses often discussed unionization in the restaurant. Their efforts at secrecy were minimal. At the August 3 party, Helton and another waitress discussed unionization in the presence of supervisor Gay. Later,

after Helton was fired, Gay told Dirkson that Helton had been fired for creating friction among the waitresses, and asked whether Helton had contacted any other waitresses. The Board's conclusion that Helton was fired for union activity was a reasonable one, and supported by substantial evidence. We enforce the order of the Board on this issue.

STATUS OF THE STRIKERS

The Board found that waitresses Nichols, Scott and Michaud struck to protest Helton's lawful discharge, and were therefore entitled to reinstatement. The restaurant argues that the waitresses did not strike, but quit their jobs. The Board found otherwise, and we conclude that its finding is supported by substantial evidence. The waitresses told manager Sturgeon that they had walked out of the restaurant because they objected to Helton's discharge and to management's treatment of the waitresses after the July 25 meeting. It was reasonable for the Board to conclude from this statement and the other evidence that the waitresses went on strike and picketed to protest the unlawful discharge of Helton. The failure of employees to present more specific demands to management at the time of their walkout does not prevent it from being a strike, within the scope of Section 7, 29 U.S.C. § 157. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15, 82 S.Ct. 1099, 1102-03, 8 L.Ed.2d 298 (1962); *Electromec Design & Development Co. v. NLRB*, 409 F.2d 631, 634 (9th Cir. 1969). It is true that during the conversation with Sturgeon, Scott said that she was tired of waitressing, and Nichols complained that her daily commute was too far. It is also true that the leaflets distributed by the picketers stated that the waitresses had quit their jobs in support of Helton. While different inferences may be drawn from the facts, however, the inferences drawn by the Board were reasonable and supported by substantial evidence. Once it was determined that the waitresses were striking to protest the unlawful discharge of Helton, they were entitled to reinstatement on the terms specified by the Board. *NLRB v. International Van Lines*, 409 U.S. 48, 50-51, 93 S.Ct. 74, 76, 34 L.Ed.2d 201 (1972). We therefore enforce the order of the Board on this issue.

THREATS AND INTERROGATION

The Board found that the restaurant had violated section 8(a)(1) by threatening and interrogating employees. An employer's interrogation of an employee violates section 8(a)(1) if, under all the

circumstances, the interrogation reasonably tends to restrain or interfere with the employee in the exercise of his or her protected § 7 rights. *Clear Pine Mouldings, Inc. v NLRB*, 632 F.2d 721, 725 (9th Cir. 1980), *cert. denied*, 451 U.S. 984, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977). The test is whether the interrogation tends to be coercive, not whether the employee was in fact coerced. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d at 725; *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981). The Board found four instances of threats or interrogation which violated section 8(a)(1). The findings are supported by substantial evidence.

On the first day of picketing, manager Sturgeon threatened to get even with the picketers. That afternoon, president Gene Johnson told a picketer that she would hate to see him get hurt by all this. Both conversations involved threats which violated section 8(a)(1). On two occasions, supervisor Gay questioned Dirkson about union activities. On August 10, Gay told Dirkson that she had to fire Helton because Helton had been antagonizing the waitresses. Gay then asked whether any other waitresses had been contacted by Helton. A few days later, Gay again asked Dirkson whether any other waitresses had been talking about the union. Taken together, these two conversations clearly implied that a waitress involved in unionization would be fired. Therefore, these interrogations violated section 8(a)(1).

THE STATE COURT SUIT

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(4) by filing and prosecuting the state court civil suit against the picketers. It is clear that "the mere filing of a lawsuit can restrain the exercise of [section 7] rights." *United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980, 983 (9th Cir. 1979). Before condemning a lawsuit as an unfair labor practice, however, the Board must be careful to make an accommodation between the rights of all persons to seek resolution of their legal claims in court and the rights of employees under the NLRA. *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960). The Board has adopted the rule that it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017, 1023 (4th Cir. 1981); *Power Systems, Inc. v. NLRB*, 601 F.2d 936,

939 (7th Cir. 1979). Thus an employer who brings a good faith action against employees for mass picketing, and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits. *Cf. Associated General Contractors v. NLRB*, 637 F.2d 556, 560-62 (8th Cir. 1980).

In this case, the restaurant's civil lawsuit had a lawful objective on its face; *i.e.*, the complaint sought relief for alleged wrongs that the state court could remedy. The Board found, however, that the restaurant lacked a reasonable basis in fact for the lawsuit, and concluded that the lawsuit was filed in bad faith to retaliate against the picketers. The Board found violations of both section 8(a)(1) and section 8(a)(4). Other courts have stated that the employer's anti-union motive is a key element of such violations. *See Associated General Contractors v. NLRB*, 637 F.2d at 561; *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1024.[1] We conclude that there is substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity.

The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated. The state court did issue a temporary restraining order to limit the number of picketers and the manner of picketing. At no time, however, did the picketers number more than seven adults and two children who demonstrated peacefully on the sidewalk outside the restaurant. The mass picketing

---

[1] We question whether motive should necessarily play a part in determining whether an employer violates section 8(a)(1) by filing a lawsuit, without a reasonable basis in fact, against an employee. On its face, section 8(a)(1) does not require a showing of motive: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7.]" In contrast, section 8(a)(4) requires a showing that the employer's conduct was provoked by the employee's filing of charges with the Board. Motive is therefore a necessary element of a section 8(a)(4) violation. Because we uphold the Board's finding of improper motive, we need not reach the question whether section 8(a)(1) may be violated in the absence of such motivation. *See Ad Art, Inc. v. NLRB*, 645 F.2d 669, 678 n.10 (9th Cir. 1981).

alleged in the complaint never materialized and the preliminary injunction was later denied.

The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with "actual malice," as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964). *See Linn v. Plant Guard Workers*, 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582 (1966). The statements contained in the leaflets were somewhat ambiguous; it was not made clear whether all the picketers' listed complaints (which the administrative law judge found to be factually true) had been made the subject of charges by the NLRB. The restaurant may therefore have believed that the leaflets falsely characterized the NLRB proceedings. But the very ambiguity of the leaflets in that regard tends to negate actual malice. In fact, the restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements. Instead, the restaurant argues that its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction. More than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1024-25.

The lack of a reasonable basis in fact for the lawsuit is some evidence that it was filed for an improper purpose. The Board's finding of an improper motive is supported by more than this reasonable inference, however. On the first day of picketing, manager Sturgeon confronted the picketers, and wrote down their names. She told them that she would "get even with you for what you're doing." She told Helton that she would "get even with you if it's the last thing I do." That afternoon, president Gene Johnson told a picketer that she would hate to see him "get hurt by all this." Five days later, the restaurant filed the lawsuit in state court. The restaurant almost immediately deposed Helton, and questioned her in depth about the identities of other pro-union employees. The deposition was conducted without the assurances against reprisal usually expected to accompany employer interrogation of employees.[2]

---

[2] The Board found that the restaurant violated section 8(a)(1) by conducting this deposition. The deposition almost certainly had a chilling effect on Helton and the other picketers. It also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings. *See NLRB v. Maxwell*,

These circumstances, in the context of other unfair labor practices which the Board found, clearly permit a finding that the lawsuit was prompted by an improper motive. The immediate effect of this lawsuit upon Helton was to penalize her for filing an unfair labor practice charge with the Board. That motive and effect clearly produce a violation of section 8(a)(4). In addition, the lawsuit carried an implicit message to the other picketers: namely, that any persons who file charges against the restaurant or picket the restaurant will find themselves in court.[3] The violation of section 8(a)(1) is also clear. We conclude that substantial evidence supports the Board's finding that the lawsuit filed by the restaurant against Helton and the other picketers violated sections 8(a)(1) and 8(a)(4). *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1025.

Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice. The federal anti-injunction statute, 28 U.S.C. § 2283, does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction. *Capital Service, Inc. v. NLRB*, 347 U.S. 501, 504-06, 74 S.Ct. 699, 701-03, 98 L.Ed. 887 (1954); *see also NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144-48, 92 S.Ct. 373, 377-79, 30 L.Ed.2d 328 (1971). Indeed, the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit.

It is true that the regulatory scheme established by the National Labor Relations Act does not of itself preempt state court jurisdiction over actions for libel arising in a labor context. *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The

---

637 F.2d 698, 702-03 (9th Cir. 1981). Because we agree that filing and conducting the libel suit was an unfair labor practice, however, we do not consider whether the deposition alone violated section 8(a)(1).

[3] The chilling effect of a state lawsuit upon activity protected by the Act is multiplied when the state action, as here, seeks large damages. Employees whose picketing is the subject of a state suit for injunction may default and simply comply with the terms of the state injunction. They can hardly afford to fail to defend a claim for $500,000 damages. *See Linn v. Plant Guard Workers*, 383 U.S. 53, 64, 86 S.Ct. 657, 663, 15 L.Ed.2d 582 (1966).

Supreme Court has recognized the potential of such state suits for interference with federally protected rights, however, and has consequently ruled that all state libel actions are preempted unless they are based upon defamatory statements published with knowledge of their falsity or with reckless disregard of truth or falsity. *Id.* at 65. This carefully drawn boundary between legitimate state and federal interests would be hopelessly obscured if a libel action was automatically sustainable so long as the plaintiff carefully drafted its complaint to allege malice. The proper test of the legitimacy of the state action is whether the plaintiff has evidence to support its allegations of malice. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 2024-25.

The state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations. The same determination, however, is one which the Board must make to decide whether filing the libel suit was an unfair labor practice. Since the Board has actually decided the issue, and the subject is central to the enforcement of federal labor policy, the Board's decision would appear to preempt further action by the state court. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 209-10, 98 S.Ct. 1745, 1763-64, 56 L.Ed.2d 209 (1978) (Blackmun, J., concurring); *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). Whether or not the state court's jurisdiction is technically preempted, however, the Board has the power to enjoin a state court lawsuit when the impropriety of that lawsuit is properly addressed and adjudicated by the Board.

We recognize that this case involves a delicate balance between federal and state interests as well as between individual rights of organization and litigation. The Board has demonstrated its sensitivity to these issues by its sparing enforcement of limitations on the right to bring suit in state court. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d at 1022-23. In the present case the employer did not offer factual substantiation of its allegations of malice, and substantial evidence supported the Board's finding that the action was brought for retaliation and intimidation of employees in their organizational rights. In these circumstances, pursuit of the state action threatened the proper enforcement of the federal act and the Board was justified in putting a stop to it.

The Order of the Board is enforced in its entirety.

Appendix A-14

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Caption deleted]

On September 27, 1979, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions and a brief in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[1] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law

---

[1] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found, *inter alia*, that Respondent violated Sec. 8(a) (4) of the Act by Supervisor Sturgeon's threat to "get even" with employee Helton for her participation in picketing Respondent's restaurant, and by Gene Johnson's, Respondent's part owner, veiled threat of retaliation to Carl Nichols, the husband of employee Cheryl Nichols, for her picketing activities. While we agree with the Administrative Law Judge's findings that the threats were in retaliation for the employees' protected activities and thus unlawful, we find no evidence to support his conclusion that such conduct was in response to Helton's filing of an unfair labor practice charge. Accordingly, we do not adopt the Administrative Law Judge's findings of violations of Sec. 8(a) (4) with respect to these incidents, but, instead, find that the threats violated Sec. 8(a) (1) of the Act.

In his exceptions, the General Counsel notes that, while the Administrative Law Judge found that employees Nichols, Michaud, and Scott were unfair labor practice strikers, he failed to set forth in either his recommended Order or notice their rights respective to reinstatement and backpay. Accordingly, we shall amend his recommended Order to include such provisions.

[3] While the Administrative Law Judge found that Supervisor Gay interro-

Judge, except as modified herein, and to adopt his recommended Order, as modified below.

Amended Conclusions of Law

1. Substitute the following Conclusion of Law 3 for that of the Administrative Law Judge:

"3. By interrogating an employee on two separate occasions on and after August 10, 1978, regarding the union activities of other employees, Respondent engaged in unfair labor practices within the meaning of Section 8(a) (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bill Johnson's Restaurants, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) Threatening to bring reprisals against employees or their spouses for picketing its premises or for engaging in other protected concerted activities."

2. Insert the following as paragraph 2 (d) and reletter the succeeding paragraphs accordingly:

"(d) Offer to employees Nichols, Scott, and Michaud, upon application, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after September 18, 1978, the commencement of the unfair labor practice strike."

---

only refers to a single incident of interrogation in his Conclusions of Law. The General Counsel requests that the Conclusions of Law be amended to reflect that two interrogations, in fact, occurred. We agree, and shall amend the Administrative Law Judge's Conclusions of Law accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. April 30, 1980

Howard Jenkins, Jr., Member

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT question any employees or former employees regarding their union activities or the union activities of others.

WE WILL NOT threaten to bring reprisals upon employees or their spouses for picketing our premises or for engaging in other protected concerted activities.

WE WILL NOT file a civil lawsuit against employees, or threaten to depose or depose them, for engaging in protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Myrland R. Helton immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and WE WILL reimburse her for any loss of earnings she may have suffered because we discharged her, together with interest.

WE WILL offer to employees Nichols, Scott, and Michaud, upon application, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired on or after September 18, 1978, the commencement of the unfair labor practice strike.

WE WILL withdraw the complaint styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v.

Myrland R. Helton, *et al.*, No. C375470, which we caused to be instituted in the Superior Court of the State of Arizona in and for the County of Maricopa, and which we filed and maintained because Helton utilized the processes of the National Labor Relations Board, and WE WILL reimburse Myrland R. Helton and all other named party defendants for all legal expenses incurred in the defense of said lawsuit, including expenses incurred in relation to Defendants' Answer and Counterclaim.

BILL JOHNSON'S RESTAURANTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Second Floor, 3030 N. Central Avenue, Box 33069, Phoenix, Arizona 85067, Telephone 602-241-2362.

Appendix A-19

DECISION OF THE ADMINISTRATIVE LAW JUDGE

[Caption deleted]

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: These cases were heard before me in Phoenix, Arizona on December 7, 8, 9 and 20, 1978,[1] based upon complaints issued by the Regional Director for Region 28 on September 20 and October 23 respectively, pursuant to charges filed by Myrland R. Helton on August 9 and September 26 respectively. The latter charge was amended on October 3, and the complaints, which were consolidated for hearing by order dated November 3, were both amended at the hearing. The complaints alleged, in substance, the unlawful discharge of four employees, unlawful interrogation, the threat to file and filing of a civil action against several employees, former employees and their respective spouses for engaging in picketing of Respondent's premises, and a threat to depose an alleged discriminatee. Respondent filed answers denying the commission of any unfair labor practices, contending the civil action which it filed in the Superior Court of Arizona, and the depositions taken pursuant to the Arizona rules of civil procedure, were lawful. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Extensive briefs were filed by the General Counsel and the Respondent and have been carefully considered.

Upon the entire record in the case,[2] and from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

Finding of Fact

I. Jurisdiction

The Respondent is engaged in the operation of restaurants in Phoenix and Mesa, Arizona. Its annual gross sales exceeds $500,000

---

[1] All dates hereafter are in 1978 unless otherwise stated.

[2] The General Counsel's motion to correct the record is granted with the exception of the correction requested on page 701, line 6. Accordingly, the motion and the Respondent's opposition thereto are received in evidence as General Counsel's Exhibits 2(r) and (s) respectively.

and its annual purchases of goods and supplies which are delivered from suppliers located outside Arizona exceeds $10,000. The Respondent admits, and it is found that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Issues

Case No. 28-CA-4970

1. Whether Helton was discharged because of her union activities in violation of Section 8(a)(3) and (1) of the Act.

2. Whether, on August 10, Suzie Gay, interrogated an employee in violation of Section 8(a)(1) of the Act.

Case No. 28-CA-5041

1. Whether Nichols, Michaud and Scott were discharged because of their union or protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

2. Whether the picketing that commenced on September 20 was to protest the unfair labor practices alleged to have been committed in Case No. 28-CA-4970.

3. Whether Gene Johnson threatened to file a lawsuit against employees in retaliation for their union and protected concerted activities in violation of Section 8(a)(4) and (1) of the Act.

4. Whether the filing and prosecution of the civil action in the Superior Court of Arizona to enjoin the named defendants, who were employees, former employees and/or their spouses, from engaging in certain conduct was filed because Helton filed the charge in Case No. 28-CA-4970 and because the other named defendants engaged in protected concerted activities, in violation of Section 8(a)(4) and (1) of the Act.

5. Whether, by threatening to depose and by deposing employees, former employees and their spouses regarding the Union and concerted activities of employees, Respondent violated Section 8(a)(4) and (1) of the Act.

6. Whether Sherry Sturgeon threatened employees with reprisals because they engaged in protected concerted activities in violation of Section 8(a)(4) and (1) of the Act.

7. Whether Don Kalfas interrogated a former employee about said employee's union activities and the union activities of other of the Respondent's employees in violation of Section 8(a)(4) and (1) of the Act.

III. The Alleged Unfair Labor Practices

The Setting

The Respondent operates several restaurants in the Phoenix and Mesa, Arizona area. Only one of the restaurants is involved in these proceedings, herein called the Big Apple. The Respondent is operated by the Johnson family. Gene Johnson is the president and mother of vice presidents Johnny and Rudy Johnson, secretary-treasurer Dena Cameron and manager Sherry Sturgeon. Lois Williams, another manager, is the former wife of Rudy Johnson. Don Kalfus is the general manager, and Suzie Gay is the day supervisor. All of the foregoing, with the exception of Dena Cameron, are alleged and admitted to be supervisors. The record establishes that Dena Cameron is also a supervisor. Myrland R. Helton, the Charging Party, and an alleged discriminatee, worked for the Respondent at the Big Apple from February 2, 1972 until terminated on August 8. At the time she was discharged, Helton was the most senior waitress at the Big Apple and the only employee receiving a bonus which amounted to 20 cents an hour. Sandy Lambertus, who had been hired in 1964, voluntarily left the Respondent's employ on August 3. Lambertus was the only waitress besides Helton who was paid a bonus. Cheryl Nichols, Carla Scott and Dale Michaud, all alleged as discriminatees by amendment to the consolidated complaint during the trial, were also waitresses at the Big Apple until September 18.

A. *Case No. 28-CA-4970*

1. Helton's Discharge

As previously noted, Helton commenced working for the Respondent in February 1972, and at the time of her discharge on August 8, was one of three regular waitresses on the breakfast shift, whose hours were 6 a.m. until 2 p.m. An overlapping shift of approximately 13 employees worked from 10 a.m. until 6 p.m. Because of the size of tips and other amenities, the breakfast shift

was considered the most desirable. Gay supervised the waitresses on those shifts.

The record shows that the waitresses first discussed the Union among themselves in about 1975. Efforts towards organizing a union, however, were not undertaken until after Johnny Johnson held a meeting of all employees on July 25, at which time he told the employees, *inter alia,* that he didn't want them to stand around talking, but instead to keep busy at all times; that they should go to the back if they wanted a drink; that they should not sit together when they ate; that they should write customers' checks starting on the top line; that they weren't to sit with customers; that they should leave the premises as soon as work was finished and not return on days off unless to eat; that they weren't to go into the kitchen or behind the fountain; that they weren't go go to the lounge except to put on lipstick and freshen up; that the waitresses should call in on "call days," as before; and that they weren't supposed to chew gum or use the company telephone for personal calls. Hardly a master at diplomacy, he went on to state that if the employees didn't follow those policies, they would be fired, in which case they would never get another job in one of the Respondent's restaurants and that he would make it hard for them to get a job at any other restaurant; that the waitresses "didn't really mean anything" and that he could replace them all within half an hour; that he could discharge them for the earrings they wore; and that they weren't worth a dime a dozen.[3] Lambertus did not attend the meeting since she had given notice she was quitting Respondent's employ on August 3. Nevertheless, she credibly testified that after the meeting she asked Gay what had transpired and was told that nothing pertained to the breakfast girls.

Feeling insecure in their jobs following the meeting, the waitresses discussed among themselves the unfair treatment they felt they were receiving, and Helton suggested they either organize a union or get one to represent them. One of the waitresses, Carla Scott, suggested that Helton draft a list of grievances for presentation to an attorney. On July 28, Helton, Cheryl Nichols, Dale Michaud (herein Nichols and Michaud) and Terry Curry, all waitresses, were discussing employee problems in the employees lounge, and Helton said she thought they needed union representation. Feeling it was

---

[3] Based upon the mutually corroborative testimony of Helton, Lois Dirkson, Dale Michaud, Cheryl Nichols and Carla Scott. Johnny Johnson did not testify.

too risky to discuss the matter while working, they agreed to meet later at the Ramada Inn located nearby. Later in the day, a customer commented to Helton that the waitresses needed a union and agreed to have a union organizer contact her.[3] Later that day, at the Ramada Inn, Helton told the other waitresses that arrangements had been made for a union organizer to contact them.

At about 11:30 a.m. on August 3, Helton, Michaud and Lambertus were discussing the Union when Gay approached them on another subject. During the afternoon, a going-away party was held in honor of Lambertus who was going to join her husband in the trucking business. Lambertus' husband was present, and talked to Helton, Gay and his wife about the Teamsters Union and its benefits, to which Helton remarked "that's what we need here is a good union." The July 25 meeting was also discussed, as were pension and profit sharing plans. Gay mentioned that she had raised the subject of profit sharing at a managers meeting, but that it hadn't been well received. Lambertus remarked that the trouble with going to the Union was that she didn't think the waitresses would stick together, and Helton responded that she felt they would "this time."[4] Gay and Helton were sitting beside each other and Lambertus was across the table. Lambertus, whom I credit, testified that she was concerned Helton would be fired because of the organizing, so that after the party she told Gay she hated to leave Helton, and that Gay responded that "She would take care of her. Because she was her friend, too . . . ."

On August 4, Helton sought to dissuade Penny Toms, who had been on vacation and had not attended the July 25 meeting, but who had been informed about it that morning by other waitresses, from quitting her job because they were organizing a union so there would be better working conditions and higher pay. Toms responded that it would never happen because Johnny Johnson had told her a couple of years previous that he "would not allow a union in his place." That same day, the customer who had earlier agreed to have a union organizer contact Helton at the restaurant, told her that the organizer had been out of town but that he would contact her on his return. When Helton impressed him with the urgency of the matter, the customer told her that all she had to do was call the National Labor Relations Board, who would tell her what to do.

---

[4] Based on credited testimony of Helton and Lambertus. Gay's denial that the Union was mentioned is not credited.

Helton took out her checkpad and wrote "NLRB" and the phone number of the Regional Office on the cardboard backing. Lois Dirkson, a hostess-cashier, saw the notation, made a comment to Helton about it and indicated she thought it unwise for Helton to be walking around the restaurant with that written on her checkpad.[5] While Gay denied she had seen the notation on Helton's checkpad, she acknowledged that sometimes the cardboard backing is wrapped around the checkstubs when it is turned in to the cashier after the pad is empty, that she has access to them and had "NLRB" been written on one, she would have noticed it. When a pad is not completely used up at the end of a waitress' shift, it is placed on a shelf in the employees lounge with the binding, which contains the waitress' name, facing out. Helton testified without contradiction that she turned in the used pad with the backing attached as a matter of practice.

Helton didn't work on August 6 or 7, but on Tuesday, August 8, worked her regular 6 a.m. to 2 p.m. shift.[6] While nothing was mentioned during work regarding her tenure, at about 3 p.m. that afternoon Gay called her at home and informed her that they had found a replacement for her[7] and that she was terminated, according to Helton, because Johnny Johnson didn't like something she had said at the July 25 meeting[8] and because of her attitude, which was not explained.[9] Helton asked if she could have a slip with her paycheck explaining why she was being fired, and Gay responded negatively, that the Respondent wasn't required by law to give her one.

On the day following her discharge, August 9, Helton filed the charge in Case No. 28-CA-4970.

---

[5] Dirkson testified without contradiction that Gay had told her that she could stay in her office during the morning shift and always know what was going on because she had people on the floor that would inform her.

[6] Payday is every other Monday.

[7] On cross-examination Gay admitted the fact she may have believed Helton was going to quit on October 1 had nothing to do with her termination. Further, a replacement did not commence working until a week after the discharge.

[8] Helton had asked a question about serving only one pancake to a customer.

[9] Helton had told Gay that she was going to look for another job but would remain until at least October 1st. October, it appears, is the commencement of the busy season.

Respondent claims Helton was discharged for refusing to abide by restaurant rules, gum chewing, use of the business phone for personal calls and failure to call in on a designated day off. While Gay testified she advised Helton of those reasons at the time she discharged her, Helton claimed otherwise. The evidence below convinces me Helton was telling the truth and Gay was not. Accordingly, I credit Helton. As a further reason for her termination, Respondent now claims Helton was insubordinate and disrespectful towards management. The evidence convinces me that it was not until after Helton had been discharged and filed a charge, that Gay went in search of reasons which might justify a lawful discharge. In this regard, the same day Respondent received a copy of the charge filed in this case by Helton, Gay questioned Dirkson about whether Johnny Johnson had said anything about gum chewing at the July 25 meeting. While Dirkson wasn't able to read what Gay had written on a legal pad she had with her, I am convinced Gay was in the process of compiling a list or reasons to justify Helton's earlier termination.

Gay's claim that Helton was terminated for the reasons stated does not ring true. While she testified one of the reasons was Helton's habit of gum chewing, which continued after the July 25 meeting, it is clear that other waitresses chewed gum after that date with no adverse effect upon their employment status. In this regard, Janet Wolff, a witness called to testify by Respondent, testified that after the July 25 meeting, she observed Helton with whom she worked 3 or 4 hours a day, chewing gum "pretty frequent. Almost every day." She went on to testify that she worked with five or six waitresses and that five or six waitresses chewed gum; that while "I don't chew gum that often myself," — she also denied chewing gum — the other girls still do, yet none has been discharged for that reason. Tidey, whose bias against Helton was obvious throughout his testimony, claimed he had observed Helton chewing gum on specific dates, July 26 and 27, and that he reported it to Gay. He admitted that since July 25 he had seen a number of the waitresses chewing gum, yet none was terminated. Tidey also alluded to the fact that in April an inspector from the County Health Department had "pointed out there was a few girls on the floor that was chewing gum and . . . it was unsanitary." According to Tidey's testimony, Helton was the only waitress to whom he spoke about the matter. It is clear from the record that chewing gum is not a violation of the Health Department Code, and no mention was made of such an alleged violation in the inspector's report. Tidey sought to add a further reason for terminating Helton by claiming she caused prob-

lems with the cooks by asking for extra food portions for customers and by ordering omelets with onions, although cooking onions on the grill is against company policy because it causes other items to have an onion taste. He acknowledged that the simple answer to a special order for an omelet with onions was to refuse to prepare it. Moreover, many waitresses have requested special orders and many have asked for extra food portions for customers. In fact, adding more to an order is justified when the cook hasn't put enough on the plate initially. To his knowledge, asking for an order containing onions never entered into a decision to discharge anyone.[10]

Gay testified she also found fault with the fact Helton failed to call in on "call days."[11] Respondent does not dispute the fact that the breakfast shift waitresses were not required to call in on "call days" prior to the July 25 meeting. Gay testified that after the meeting she specifically told Helton "Don't forget to call in." However, according to her, Helton was the only one she told to do so. Which raises the question: Why Helton? The most senior employee, Lambertus, was never required to "call in" on an off day, and she credibly testified that while she didn't attend the July 25 meeting, she asked Gay what had transpired and was told that "nothing pertained to the breakfast girls . . . " Not until September, a month after Helton's discharge, was Michaud, on the breakfast shift since sometime in July, told that she had to call in. Cheryl Nichols credibly testified that she also never called in on her off days when she worked the breakfast shift, nor did Penny Toms. In fact Toms testified that no one she knew who worked the breakfast shift was required to call in. Further, Carla Scott credibly testified that while she started on the breakfast shift about August 1, it wasn't until after Helton was terminated that the breakfast shift waitresses were told they had to call in. Dirkson's testimony confirms that fact.

Another reason Gay asserts led to Helton's termination was her use of the Respondent's business phone for personal calls. Gay admitted that prior to the July 25 meeting she let the waitresses use

---

[10] Respondent apparently finds fault with the fact Helton may have asked for substitutions on the menu. It is clear, however, that requesting substitutions was not unique with Helton, but, according to Sturgeon, is a recurring problem.

[11] Waitresses, except for those on the breakfast shift, were required to call in on one specific day off to see if they were needed.

the business phone.[12] She testified that Helton worked on her shift over 6 working days between July 25 and the date of her discharge, and that on each day Helton used the business phone without permission in order to awaken her husband at 7 a.m., as she had done in the past. She "thought" she mentioned her using the phone after July 25, but didn't say anything on the other occasions. Helton, on the other hand, testified that she had used the business phone after July 25 on three or four occasions to awaken her husband and on another occasion to tell him to pick her up from work at a later hour. She testified she had obtained Gay's permission on each occasion, and that a couple of days after the July 25 meeting Gay told her that she and Lambertus could use the business phone. Dirkson testified that she had overheard Gay tell Helton to use the business phone rather than spend her money on the pay phone, and that Gay had told her, when she first started working, that Helton and Lambertus were permitted to use the business phone. Of further significance is the fact that Gay told Lambertus that nothing that was said at the July 25 meeting pertained to the breakfast waitresses.

Respondent contends another factor leading to Helton's discharge was her insubordination and disrespectful attitude toward management. Examples of offensive conduct, argues the Respondent, involved arguments with a fountain employee, James Sanford; Helton's conduct regarding a day off on her birthday; her insistence on extra portions for customers and special orders for herself (previously covered herein); and a purported statement to the effect she would like to put the Johnsons, with the exception of Gene, in a jar and screw the lid on and watch them die. With respect to the alleged offensive conduct involving Sanford in April, I find it significant that Sanford was terminated on April 20,[13] leading me to conclude that long-term employee Helton was not the transgressor. In any event, even if she and Sanford had differences, Gay testified they were both sent back to work. The statement regarding the placement of the Johnsons, with the exception of Gene, in a jar and let them die, purportedly was made by Helton at the August 3 going-away party for Lambertus, and in her presence. Helton specifically denied making the statement, and her testimony is corroborated by Lambertus. Accordingly, I do not credit Gay's testimony that Helton ever made such a statement.

---

[12] Pay phones located in the restaurant were available to the waitresses.

[13] Respondent's Exhibit No. 7.

Sturgeon testified that she always had trouble with Helton and had talked to Gene Johnson over a 2-year period about terminating her. According to her, Helton had worked for Respondent so long she didn't feel she had to follow the policies.[14] Contrary to Sturgeon, Gay apparently had no complaint about Helton's following company policies until sometime after the July 25 meeting. Which, since Gay was more closely in contact with Helton than Sturgeon, casts doubt on Sturgeon's testimony. Moreover, I find it unlikely, indeed incredible, that Helton would have been one of only two employees receiving a bonus up until the time of her discharge if she had been the poor employee the Respondent's witnesses characterize her.[15] Of further significance in assessing the Respondent's reasons for terminating Helton is the fact that Respondent's supervisors expressed union animus, specifically when Johnny Johnson told Toms he would never allow a union in his place; when Gay, on numerous occasions, told employees that the words "union and sue" were two words that employees weren't permitted to use, and that one could be fired for saying them. I also find it significant that Helton, at the time of her discharge, was the most senior waitress and, as noted, the only one receiving a bonus at that time; that she had never been reprimanded, and that Gay had told Dirkson that she knew what was going on because she had an informer on the floor.

Paragraphs 7, 8 and 9 of the complaint in Case No. 28-CA-4970, allege that Helton was discharged on August 8 because she engaged in union and other concerted activities. The principal question then is whether the Respondent, in discharging employee Helton on August 8, was motivated at least in part by antiunion animus. It is settled law that the Board "is not compelled to accept" the employer's stated reason an employee was discharged "when there is reasonable cause for believing that the ground put forward by the employer was not the true one and the real reason was the employer's dissatisfaction with the employee's union activity." *Great Atlantic and Pacific Tea Co.* v. *N.L.R.B.*, 354 F.2d 707, 709 (C.A. 5, 1966). "And, a discharge motivated only in part by antiunion discrimination is similarly illegal." *J. P. Stevens & Co.* v. *N.L.R.B.*, 380 F.2d 292, 300 (C.A. 2, 1967), cert. denied, 389 U.S. 1005.

---

[14] Sturgeon also testified that when Helton learned she was scheduled to work on her birthday in May, she cried, and consequently Sturgeon told her to go home.

[15] Lambertus was the only other employee to receive a bonus.

Based on the foregoing, I find that Respondent's decision to discharge Helton on August 8 was not motivated by any of the several reasons advanced by the Respondent. I am convinced that the motivating force in Respondent's action was its desire to eliminate a known union adherent. In the circumstances of this case, such an inference seems appropriate under the rationale of the Court in *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966): "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact . . . required to be any more naif than is a judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal — an unlawful motive — at least where . . . the surrounding facts tend to reinforce that inference . . . " Here, the "surrounding facts" preponderate in favor of a finding that the Respondent, in discharging Helton, was motivated by its knowledge that she was a union adherent, and that the reasons advanced by the Respondent are false. Accordingly, by engaging in such conduct, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. Interrogation by Gay

Paragraph 9(b) alleges that on or about August 10, Gay interrogated an employee about the activities of Helton and other employees.

Dirkson testified that the day after Helton's discharge, she had the following conversation with Gay:

> I said, I'm going to say what I have to say about Ruth's discharge now. And, then, we'll let it go, and I said, — she said, are the girls on the floor blaming me? And, I said, everybody thinks that Ruth got a raw deal. And, she said, I had to do it. She said, Ruth had been antagonizing the girls on the floor. She said, I can't run a shift with that type of friction. She said, I've been sick for three (3) days, knowing that I had to discharge Ruth, but when Johnny Johnson tells you to fire somebody, as a part of my job, I do it. And, then she asked me if I knew Ruth had any contact with any of the girls and I said, no. That's all of the conversation that I recall.

She testified that a day or two after the letter arrived from the Board advising that Helton had filed a charge, Gay "asked me if I knew if there were any waitresses that had been talking about the Union." The Respondent argues that since the conversations related above occurred on the floor of the restaurant and not in a private office; were two-party discussions between friends and Gay's demeanor or manner was not threatening; that since Gay didn't press the inquiry; that there is no evidence Dirkson felt restrained or threatened; and since they comprised an isolated incident, a violation of Section 8(a)(1) should not be found. In the context of the entire case, these conversations indicate to me an attempt on the part of Gay to determine the full extent of Helton's union activities, and whether any of the other waitresses were also involved. These are classic examples of unlawful interrogation which require no recitation of authority.

B. *Case No. 28-CA-5041*

1. Alleged Discharge of Nichols, Michaud and Scott

The complaint alleges that on or about September 18, Nichols, Michaud and Scott ceased work concertedly and went out on strike in protest over Helton's discharge, and that Respondent discharged them for engaging in such activity.[16] The Respondent contends these three employees voluntarily quit their employment. The record shows that at approximately 11 a.m. on September 18, these three waitresses turned in their customer checkpads to the cashier and walked out of the Restaurant without giving anyone an explanation. Upon checking the checkpads, it was noted that Scott had written on hers "End of this place, 9/18/78, CAR."[17] The fact the three had left was reported to Lois Williams, who, with Sherry Sturgeon, observed the three drive away. About 2:30 that afternoon, they returned in order to make out and sign "tip slips" in order to get paid.[18] When they walked in, Williams told them they could pick

---

[16] The allegation the three were discharged was added by amendment during the trial.

[17] "CAR" indicates Carla Scott.

[18] Payday is every other Monday and tip slips are made out on the Monday or Tuesday preceding the next payday. Regular payday was to have been September 25.

up their checks in the office which is at another Phoenix location. Sturgeon then asked the three to sit down in a booth and explain to her why they had "walked out." They responded that they didn't believe the way Helton had been fired was right, and that they didn't like the treatment they had received at the hands of Johnny Johnson since the July 25 meeting. After they had explained what had happened at the July 25 meeting, Sturgeon indicated that she hadn't been aware of what had taken place on that date, and that now that she was back things were going to change. According to Williams, Scott stated that she was trying to get out of waitressing and would like to get into something else like office work, and Nichols stated she was tired of driving all the way from Sun City where her husband worked and that she had heard that Kalfas was coming back and she refused to work with him. Williams indicated that if Nichols had asked for a transfer to the "west-side store," she was sure they could have arranged it. According to Williams, Michaud didn't say anything.

The General Counsel contends the three women walked out on strike on September 18 in protest over Helton's discharge which they believed to have been for union activities, and that they were discharged that afternoon as evidenced by the issuance of paychecks. The Respondent contends they quit their employment, and that the issuance of the checks immediately was to avoid any problem in light of a statute requiring that "When an employee quits the service, or is discharged therefrom, he shall be paid wages due him *at once*" (emphasis supplied). While it may well have been, as the Respondent argues, that the waitresses may have wanted to, and in fact intended at some time to quit their employment with the Respondent, I am satisfied that on September 18 they walked out in protest over Helton's discharge and in protest over the July 25 meeting, but that they did not quit their employment. Nor do I believe they were terminated by the Respondent. In view of the statute set forth above, I am unable to attach the significance the General Counsel does to the issuance of the checks on the same day the women walked out, and it may well have been that Williams and Sturgeon believed they had quit when they walked out without any prior notice. Further, I note that upon their return to the restaurant, they were invited to explain why they had walked out, and upon learning that one of the problems involved Johnny Johnson and the rules laid down at the July 25 meeting, Sturgeon, in what I conclude was a conciliatory move, stated that she hadn't been aware of what happened at that meeting, but that now that she was back, things would change. I note further that none of the waitresses stated they had quit, and

while they may have believed they would be terminated for having walked out, they were not told at any time that they were in fact terminated. I conclude on this evidence that on September 18, Nichols, Scott and Michaud ceased work concertedly and went out on strike in protest of the discharge of Helton, as alleged in Paragraph 8(a) of the amended complaint, and in protest over Johnny Johnson and conditions following the July 25 meeting. Contrary to the allegation in Paragraph 8(b), however, I do not find that they were discharged, and therefore recommend dismissal of Paragraph 8(b).

2. Picketing and Alleged Threats

The complaint in Case No. 28-CA-4970 issued on September 20 alleging Helton's discharge on August 8 for union or other concerted activities. On that same date Helton and her husband, Nichols and her husband, Scott, Michaud, and former employee Debra Mackie[19] picketed the Big Apple with a number of signs critical of the restaurant and its management, asking that it be boycotted and stating that it had been accused of engaging in unfair labor practices. Upon observing the pickets walking back and forth across the driveway and talking to those entering, Sturgeon called Rudy Johnson at home and told him what was going on. Rudy, who watched the picketing from the time he arrived at the restaurant until he left, called the police who apparently advised the pickets of their rights. In the meantime, Sturgeon, who admitted she was mad and used profane language in speaking with the pickets, came out to the picket line. Helton testified as follows concerning the conversation that took place:

> A. . . . Sherry came out and said don't block my fuckin driveways and we said we're not blocking your driveways and she said, and get the fuck off my property. And, I said I'm not on your property, but if it will make you happy, you know, we've been walking across the driveways, not stopping and then walking back, and I said, if it will make you happy we'll stay right here in front and not cross the driveways. And, she said, you might think you're funny, but I intend to have the last laugh. And, she said, I will get even with you for what you're doing to us. And, I said, don't threaten us, Sherry. And then, she walked

---

[19] Mrs. Mackie's name also appears herein as Mackey and Makey.

> across and she had a paper and she said to Debby Makey, who the hell are you. And Debby said, I'm Debby Makey, I used to work here. And then she said to Dale, and who are you. And, Dale told her her name and she said, you're going to all pay for this. And, she said, and Debby, you and Dale as my witness, Ruth I'll get even with you if it's the last thing I do. And I do intend to have the last laugh. And, I just told her don't threaten us again. And, she started back across the parking lot. And, she stopped about half way across and looked back, and she said, is these your right names, I think is what she said. And, I said yeah, and there's some more coming down, do you want their names too. And, she said, no this will be enough. And, then she went on inside.
>
> Q. Were you laughing at the time?
> A. No, I wasn't laughing. I was scared.

Sturgeon's account of the conversation was "I told them they could picket all they wanted too, just to say — don't block the driveway. They started moving out of the driveway in front of the building on the sidewalk. And, Ruth [Helton] was holding that sign out, sort of waving it back and forth, like some horse in a parade grinning from ear to ear. And, it made me mad. And, I told her she thought she was so funny, we would see who would have the last laugh." Helton's testimony, corroborated in material part by Michaud, is credited over the more limited Sturgeon version. As it is clear on this record that the picketing being conducted was a protected concerted activity, it is equally clear that Sturgeon's threat to get even with Helton for engaging in such activity violated Section 8(a)(4) and (1) of the Act as alleged in Paragraph 13 of the amended complaint.

Carl Nichols testified that he received a telephone call at home that afternoon from Gene Johnson. The substance of his testimony was that Gene asked why he and his wife Cheryl had been picketing; that he told her in protest over Helton's termination and that the waitresses were upset with some of the things Johnny Johnson had said at the July 25 meeting; that Gene replied that she would hate to see the Nichols lose the new home they had bought; and that on two occasions during the conversation "she said that she would hate to see us get hurt by all of this." Gene Johnson admitted making the call to Carl Nichols and that its purpose was to reassure him that Cheryl had not been terminated. She denied she said anything about anyone losing a new home or getting hurt by what had hap-

pened. While in many instances it is difficult to determine which of two witnesses is telling the truth in one-on-one conversations, I entertain no doubt in this case. Carl Nichols impressed me as honest witness making a conscientious effort to tell the truth. Gene Johnson, on the other hand, left a distinct impression that she had memorized a story. In this regard, I find it incredible that she would not have personally assured Cheryl, who had answered the phone and was the purported subject of the conversation, that she was not terminated, instead of calling her husband to the phone in order to make what I find to be a veiled threat for having engaged in the picketing. I conclude that her threat was but an extension of Sturgeon's threat to get even for engaging in the same conduct, and that both instances of threats were designed to persuade the picketers to cease their lawful activities, and ultimately culminated in the filing of the civil suit discussed hereafter. Accordingly, I find that by making such veiled threat, the Respondent violated Section 8(a)(4) and (1) of the Act as alleged in Paragraph 15(b) of the amended complaint.

3. Respondent's Civil Action

Picketing continued on September 21 and 22 by substantially the same individuals. On the latter date, and again on September 26, the pickets distributed the following leaflet:

> THE NATIONAL LABOR RELATIONS BOARD HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT, 3757 E. VAN BUREN STREET, FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> - Eight hour shifts with no specified breaks.
> - No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.

- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, the attorneys for Respondent filed a complaint in the Superior Court of the State of Arizona, alleging, *inter alia*, that the pickets had engaged in mass picketing and harassment, published libelous statements in the above leaflet, and created a threat to public safety. For the purposes of the instant proceeding, the thrust of the state action is that "the leaflets contained false and outrageous statements, including misrepresentations of proceedings pending before the National Labor Relations Board and accusations that the Restaurant's waitresses had complained about 'unwarranted sexual advances' and about a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided." The complaint sought monetary damages in the amount of $500,000, a temporary restraining order, other injunctive relief enjoining the defendants from trespassing, mass picketing, interfering with its business operations, engaging in acts or threats of violence, harassment or intimidation of any kind and "publishing false and misleading statements concerning plaintiffs' business, officers, agents, employees, facilities or practices, including but not limited to allegations misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board in Case No. 28-CA-4970."[20] On the same day Respondent filed its state court action, it distributed a letter to its employees claiming Helton had filed a charge in Case No. 28-CA-4970 in bad faith and appealing to the employees to reject attempts to organize them. Two days later it

---

[20] Named as defendants were Myrland and John Helton, Barbara and Lawrence Orr, Cheryl and Carl Nichols, Carla Scott, Debra Mackie, Dale Michaud and Jane and John Does, I through X respectively. In addition to the corporate Respondent herein, named as plaintiffs were Johnny and Rudy Johnson and Don Kalfus.

distributed a second letter appealing to employees to reject organization efforts.

Helton's testimony that she had told Gay about both an unwarranted sexual advance toward her and that the women's restroom was filthy, the latter remark having been overheard by Gene Johnson, was not refuted in the hearing before me. Also, testimony of sexual advances by Johnny Johnson and Kalfus toward Helton, Scott, Cheryl Nichols and Lambertus were not denied.[21] The testimony of the General Counsel's witnesses, corroborated in part by Gene and Rudy Johnson, and the Respondent's stipulation concerning "inconsistent management practices" establish the truthfulness of the seven other "waitresses' complaints" listed in the leaflet.

Respondent also filed with the state court a motion to shorten the statutory time for taking depositions and requesting they be taken on September 27 and 29 or October 2 and 3 if more convenient to the witnesses. Notices of taking depositions on September 27 and 29 were served on the defendants, the Heltons' to be taken on September 27 and the other defendants on September 29. The hearing on the temporary restraining order was held at noon on September 25. Helton was not informed of the complaint or hearing on the temporary restraining order until she received a telephone call from Katz, Respondent's attorney, less than an hour before the matter was scheduled to be heard.[22] Katz informed her of the hearing at noon, that she and her husband were defendants, and read her the names of the other defendants. Helton responded that Katz shouldn't be scaring the others, to which Katz replied "Aren't you," and Helton responded negatively. She testified that while she was unable to attend the hearing at noon because of the short notice, her husband did. The Court issued a T.R.O. granting substantially all of the relief requested, and set October 5 as a hearing date on the request for a temporary injunction.

On September 26, the Heltons, and later all of the defendants in the state court proceedings, hired attorney Michael J. Keenan to represent them. In a discussion with Keenan on September 27, Katz expressed his intent to question Helton regarding the facts relied

---

[21] See transcript pages 879-883, 822, 830-831, 837.

[22] Katz had apparently called Scott a few minutes earlier, who had in turn called Helton right before Katz called her. The evidence does not disclose that any of the other defendants in the state matter were notified.

upon in determining that she had been fired for union activity, and indicated he may not need to take any depositions other than Helton's. In a second telephone conversation with Keenan, Katz outlined questions he proposed to ask Helton which centered around the facts she relied on in making the statement in the leaflet that she had been discharged because of her union activities. On September 28 Keenan's law firm filed in the state court a motion for protective order seeking to limit the scope of the deposition examination to preclude Respondent herein from obtaining discovery of matters covered in the complaint in Case No. 28-CA-4970, on the ground it was privileged under *N.L.R.B.* v. *Robbins Tire and Rubber Company*, 434 U.S. 1061 (1978). The Court denied the motion for protective order and initially ruled that ". . . the allegations regarding union organizing and the statements made to any investigators in that case [28-CA-4970] may not be inquired into." Katz, seeking clarification of the order, went on to argue that since the leaflet publicly accused the Respondent of discharging Helton because of her union activities, and since she knew the statement to be false, Helton had maliciously libeled the Respondent, therefore entitling it "to defend and protect our reputation by asking the facts, why she made the statements to a public agency as opposed to some other forum." In a partial reversal of her previous ruling, the Court ruled that while questions about statements made to NLRB investigators would not be proper, the Respondent could ask questions "regarding the statements made publicly in Maricopa County, and the basis for those statements."

In taking the depositions of Helton and the other defendants in the state court proceeding, Respondent's counsel directed numerous questions toward the nature and extent of Helton's union activities and the activities of other employees, supervisory knowledge of those activities and the Respondent's antiunion animus. Numerous questions were also asked of some of those witnesses regarding call days, use of the company phone for personal reasons and gum chewing, all matters relating to the Respondent's defense in the instant unfair labor practice proceeding.[23]

---

[23] The depositions of Barbara and Lawrence Orr were taken on September 29; of Myrland R. and John Helton on October 2; of Carl and Cheryl Nichol and Dale Michaud on November 10. In preparation of his defense to the state court action, the Defendant's attorney took the depositions of Johnny and Rudy Johnson, Kalfus and Gay.

On the evening after Helton's deposition, Kalfus called Lambertus at home. He told her that her name had been mentioned several times during Helton's deposition, that he felt Helton had gotten a "bad deal," and that "he wanted to know if Suzie [Gay] was aware that the girls were trying to organize a union." After she responded affirmatively, Kalfus replied "Oh no," that he had hoped she would tell him differently. Lambertus called Helton and told her of the conversation. As alleged in paragraph 15(a) of the complaint, such interrogations violate Section 8(a)(1) of the Act. As it could reasonably be expected that Lambertus would tell Helton of the conversation, as she did, the question has its nexus in the taking of the deposition resulting from the filing of the state proceeding, which I find unlawful hereafter, and consequently the interrogation also violates Section 8(a)(4) of the Act.

On November 16, the state court denied the Respondent's request for a preliminary injunction and dissolved the T.R.O. Still pending before the state court is the Respondent's request for a permanent injunction and damages, and a defendant's counterclaim against the Respondent for abuse of process, malicious prosecution and wrongfully securing an injunction.

Positions of the Parties and Conclusions

1. The Civil Suit

Acknowledging the general rule expressed in *Clyde Taylor, Inc.*, 127 NLRB 103 (1960), that generally, the filing of a civil suit does not constitute an unfair labor practice, the General Counsel argues that where the lawsuit is in furtherance of an unlawful objective, as here, the Board will find a violation. The General Counsel relies chiefly on *Power Systems, Inc..*, 239 NLRB No. 56, enfd. denied ___ F.2d ___ , (C.A. 7, decided July 18, 1979).

The Respondent relies on a line of cases following *Clyde Taylor*, and the more recent case of *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977), where the Board reversed an Administrative Law Judge who had found the Respondent violated Section 8(a)(1) by instituting a slander action against an employee, seeking $50,000 in damages. The Respondent argues that *Power Systems* is readily distinguishable on its facts in that the employer in that case originally sought monetary damages and an order enjoining the employee "from filing cases against Respondent with the courts and administrative agencies of the United States Government and the several states of the United States."[1] Here, argues the Respondent, it did not institute the state court proceeding to challenge the employees'

right to file a charge with the Board; instead, the suit challenges the right of employees to make defamatory accusations and to engage in mass picketing, when such conduct interferes with and damages the Respondent's business operations and reputation and threatens the public safety. Unlike *Power Systems*, it argues, the Respondent's suit does not seek to enjoin or restrain access to the Board, or to recover compensation for damages suffered due to employee resort to the Board. Instead, the civil complaint prays for damages resulting from the commission of the following unlawful acts: (1) trespassing on restaurant property; (2) mass picketing; (3) interfering with ingress or egress; (4) engaging in violence, threats of violence or intimidation; and (5) publishing false and misleading statements concerning the Respondent's business, officers, employees, or practices, including "misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board as Case No. 28-CA-4970." According to Respondent, the defendants in the civil suit have publicly distributed leaflets accusing Respondent of discharging Helton for union activity, of making "unwarranted sexual advances" at employees, and maintaining a "filthy restoom" with malicious intent to injure its business. The Respondent claims that under *Power Systems*, the issue before me is whether the Respondent had a "reasonable basis for the filing of a lawsuit," contending, of course, that it did, since the stated purpose was "to bring an end to the distribution of leaflets which contained statements that the managers believed to be personally and professionally defamatory."

Respondent contends further that if its civil suit was lawful, and if the discovery obtained in conformity with the state court order was relevant to the civil suit, then the discovery was lawful, and whether it would be relevant to, or utilized in another proceeding, is totally immaterial.

Conclusions

1. The Civil Suit

In *Power Systems*, the Board determined that since the employer did not have a reasonable basis for the filing of its lawsuit, that the lawsuit had as its purpose the unlawful objective of penalizing the employee for filing a charge with the Board, thus depriving him of, and discouraging employees from seeking, access to the Board's processes, in violation of Section 8(a)(4) and (1) of

the Act. In denying enforcement of the Board's Order, the Court of Appeals concluded that the stipulated record did not support the Board's determination that *Power Systems* had no reasonable basis for its suit against the employee, and consequently the inference that the suit had as its purpose the unlawful objective of penalizing the employee for filing a charge with the Board, could not stand. The Court went on to state, however, "We recognize that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and that the Board may, in a proper case, act to curb such conduct." In my view, this is a proper case to do so. I conclude, on the basis of the record and from my observation of the witnesses, including their demeanor, and upon the extensive briefs of the parties, that the Respondent did not have a reasonable basis for the filing of its lawsuit, and that its effect has been to discourage employees from seeking access to the Board's processes.

The genesis of the civil suit is the leaflet distributed by Helton and the others and the picketing associated with it. By interpreting the leaflet to mean something other than what it literally states, the Respondent claims that the statements were made with malice, i.e., knowledge that they were false, and with an intent to damage the Respondent.

The civil complaint alleges that, contrary to the signs carried and statements made by the "defendants," no boycott or strike was in progress. The legend on the picket signs declared a boycott, and the presence of the waitresses who withheld their services when they walked off the job on September 18 in protest over Helton's discharge, and over the July 25 meeting, together with the complaints outlined in the leaflet, clearly establish the existence of a strike. Further, Rudy Johnson heard Scott say that the pickets were on strike. Any contention to the contrary is pure folly.

The civil complaint alleges that the leaflet contained false and outrageous statements, including: (1) misrepresentations of proceedings pending before the National Labor Relations Board; (2) accusations that the waitresses had complained about "unwarranted sexual advances" and about "a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided"; (3) oral statements maligning the Respondent and their business to Respondent's employees, customers, passersby and other persons.

The leaflet requires close examination. It states that the Board issued a complaint against the Respondent as a result of charges filed by Helton, who was fired August 8 after suggesting other

employees should organize a union. It is a fact that on September 20 the Board issued a complaint against Respondent as a result of a charge filed by Helton who was fired on August 8, and that the gist of the complaint is that Helton was discharged after attempting to organize the other waitresses. An entirely true statement, and the formal exhibits show Respondent's counsel received a copy of the complaint on September 21, several days prior to the filing of the civil suit. The facts surrounding Helton's discharge have convinced me, as found earlier, that Helton was discharged for engaging in union activities, that agents of Respondent were aware of her activities, that antiunion sentiment had been expressed over a period of several years by Respondent's agents, and that the reasons advanced by the Respondent for Helton's termination were false. Hence, it is clear that the leaflet does not contain a misrepresentation concerning the Board's proceeding as the Respondent contends.

The civil complaint alleges the leaflet contained a false and outrageous statement that the waitresses had complained about "unwarranted sexual advances" and about "a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided." Contrary to the Respondent's allegation, the leaflet does not state that the waitresses "had complained" about those matters. However, as found earlier herein, Helton's testimony that she had told Gay about both an unwarranted sexual advance toward her, and that the women's restroom was filthy, the latter remark having been overheard by Gene Johnson, were not refuted in this record. Further, the evidence establishes the truthfulness of all six "waitresses' complaints" listed in the leaflet. Therefore, it is clear the leaflet contains no misrepresentations concerning waitresses' complaints.

The civil complaint alleges, without specifying, additional outrageous and false statements maligning it were made by the protesters. The record contains no evidence capable of such a construction.

The civil complaint alleges the protesters clogged the sidewalk, harassed Respondent's customers and employees, and blocked ingress and egress from the restaurant. The evidence fails to support any of these contentions.[24] It is significant that after hearing testi-

---

[24] Rudy Johnson testified pickets didn't block ingress or egress. Further, while he testified he called the police during the picketing, there was no evidence this was done because they had engaged in any unlawful conduct. Rather, he testified he called the police to advise the pickets of their rights.

mony on November 16, the state court denied Respondent's request for a preliminary injunction and dissolved the temporary restraining order.

Other significant factors in determining the Respondent's real motive in filing the civil suit are two incidents that occurred on September 20, the first day of picketing, and prior to the distribution of the leaflets: (1) Sturgeon's threat to "get even" with Helton for picketing Respondent's premises; and (2) Gene Johnson's veiled threat to Carl Nichols with respect to losing the new home the Nichols had just bought, and that she would hate to see them "get hurt by all this." These statements presage the Respondent's later action, i.e., the filing of the civil suit, and establish the true purpose behind the lawsuit was to punish Helton for having filed the charge in Case No. 28-CA-4970, and to punish the picketers for engaging in protected concerted activity, and to prevent them from further asserting those rights.

As the General Counsel had issued a complaint so alleging, I conclude that Helton had a reasonable basis upon which to form a belief that she had been unlawfully discharged at the time the leaflet was circulated and that the waitresses complaints listed thereon were valid. In my view, the Respondent had no reasonable basis upon which to assert that the filing of Helton's charge with the Board, and that the publication of the leaflet was made, without probable cause. Respondent's lawsuit placed its employees on notice that if an employee files charges with the Board, or makes public a dispute with the Respondent, that employee is subjecting himself to the possibility of a lawsuit which will require immediate expense by having to hire private legal counsel to defend against the lawsuit and to face the possibility of having to reimburse the Respondent for legal fees and damages if the state court upholds the Respondent's claim. Even if the Respondent's lawsuit is dismissed by the state court, Helton and the other picketers will have been required to pay legal fees as a direct consequence of her having filed a charge with the Board. Accordingly, I find that the Respondent's lawsuit is an attempt to penalize Helton for having filed charges with the Board, and to penalize the other defendants for assisting Helton in her protest of the unfair labor practice committed against her, thus, the Respondent has violated Section 8(a)(4) and (1) of the Act. *The United Credit Bureau of America, Inc.*, 242 NLRB No. 138 (1979); *George A. Angle*, 242 NLRB No. 112 (1979); *Power Systems, supra*.

The Depositions

In conducting the depositions of Helton and other employees and former employees of Respondent, Respondent's counsel directed numerous questions toward the nature and extent of Helton's union activities, the union activities of other employees, supervisory knowledge of these activities and Respondent's antiunion animus. In addition, Respondent asked numerous questions regarding purported violations of restaurant policies, in an obvious maneuver to establish a defense to Case No. 28-CA-4970.

Since these same activities and subject matter were also at the time of the taking of the depositions the subject of a pending Board proceeding, the General Counsel contends that the giving of state court notices to employees and former employees that they were required to submit to deposition by Respondent's attorney and the subsequent taking of those depositions constituted an unlawful interrogation in violation of Section 8(a)(1) and (4) of the Act.

Rule 30(a) of the Arizona Code of Civil Procedure which was patterned directly after Federal Rule 30(a) provides:

> After commencement of the action, any party may take the testimony of any person, including a party by deposition upon oral examination. Leave of the court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service which is completed under Rule 4(e) . . .
>
> * * *
>
> The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

Rule 26(b)(1) of the Arizona Code regarding the scope of discovery states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party . . .

It should be noted that typically a party does not have to obtain leave from court to obtain depositions under the Arizona Rules and he does not have to show good cause. Additionally, there is no restriction on the scope of the matters which he can discover. It was pursuant to these broad provisions of the Arizona Code of Civil

Procedure that Respondent obtained the depositions of its employees and former employees.

In stark contrast to the liberal discovery rules of Arizona, Section 102.30 of the NLRB Rules and Regulations provides that testimony may be taken by deposition only upon application to the regional director prior to the hearing and to the administrative law judge during and subsequent to the hearing and, most importantly, good cause must be shown to obtain a deposition order.

While there has been some dispute within the Federal Courts of Appeal regarding the interpretation of the good cause requirement of Section 102.30 (for example, the Fifth Circuit has held that the requirement can be satisfied by simple discovery needs, *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 403 F.2d 994, 996 (C.A. 5, 1968); *N.L.R.B.* v. *Safway Steel Scaffolds Co.*, 383 F.2d 273 (C.A. 5, 1967), *cert. denied*, 390 U.S. 955 (1967), but this particular view has not generally been accepted by the other Circuits and was persuasively refuted in *N.L.R.B.* v. *Interboro Contractors, Inc.*, 432 F.2d 854, 859 (C.A. 2, 1970)), the Board has consistently held the good cause requirement to mean that depositions may be taken for use as evidence in an action when there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing, and that the Rule was never intended to provide for the taking of depositions solely for discovery purposes when witnesses will be available for trial. *N.L.R.B.* v. *Interboro Contractors, supra*, 857-858; *Title Guarantee Co.* v. *N.L.R.B.*, 534 F.2d 484 (C.A. 2, 1976).

The rationale underlying the Board's limitation on the taking of depositions for the purpose of pre-trial discovery is "Based not only on the cost and inconvenience full discovery would impose on administrative proceedings but also on the peculiar nature of a labor dispute, . . . Board witnesses and other persons with relevant information are typically employees of the company defending an unfair labor practice charge. The company's position of control over the persons' livelihoods mandates protection that is not usually necessary in ordinary litigation." *P.S.C. Resources* v. *N.L.R.B.*, 576 F.2d 380, 386-387 (C.A. 1, 1978).

Though Respondent's attorneys, therefore, could not have taken the depositions of Helton and the other employees consistent with the Board's rules, they were not completely precluded from legitimately interrogating employees on matters involving their Section 7 rights. Interrogation for "legitimate cause" can be conducted without incurring Section 8(a)(1) liability where it is directed toward

"the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for the trial of the case." *Roadway Express, Inc.*, 239 NLRB No. 76 (1978), slip op. p. 22, quoting *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enforcement denied on other grounds, 344 F.2d 617 (1965). However, in pursuing such an investigation in preparation for trial, certain safeguards established by the Board in *Johnnie's Poultry* and *Roadway Express* must be observed and if transgressed by an employer would constitute a violation of Section 8(a)(1):

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the question must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. *Johnnie's Poultry, supra*, at 775.

As General Counsel contends, Helton and the other defendants named in the civil suit were not deposed voluntarily and only submitted upon being subject to legal process. There were no assurances that reprisals would not be taken and the questions asked far exceeded the relevance to the libel and wrongful interference suit. On the other hand, the questioning explored in depth Helton's union activities, which were the subject of a pending Board hearing. Many questions were also directed at discovering the union activities of other employees and knowledge of union activities on the part of a supervisor. Still others explored the strength of the Respondent's defense to the unlawful discharge allegation. These circumstances would adequately support an inference that the questioning in this particular subject area was directed more toward discovering evidence and examining potential witnesses for the Board hearing than for preparation for the state civil suit. In that sense, it could be said that the full purpose of the questioning was not conveyed to the employees interrogated.

Absent the state court's imprimatur on the interrogation by deposition, the questioning under the circumstances of this case would necessarily have to be considered coercive within the meaning of Section 8(a)(1).

Respondent's utilization of Arizona's liberal discovery rules to obtain the depositions of its employees in furtherance of a separate state action effectively allowed Respondent to bypass the Board's established procedures and obtain through the backdoor evidence which was closely associated with the issues in the pending Board hearing. Consequently, it is necessary to determine whether the NLRB's stricter discovery procedures pre-empt the state's looser standard to the extent that the Board's stricter standards are implied within a state court discovery order affecting a pending Board proceeding and involving essentially the same parties and many of the same issues. Additionally, it must be determined whether the failure to observe these stricter standards violates Section 8(a)(1) of the Act.

Respondent cites *Jay V. Zimmerman Co.* v. *National Mask & Puppet Corp.*, 13 F.R.D. 172 (E.D.N.Y., 1952) to support its contention that discovery in a separate action is not precluded even though it may impinge on proceedings in another action. The *Zimmerman* case was an action for unfair competition wherein defendants moved for a protective order respecting the taking and subject matter of their depositions. The District Court held that although the precise issues in the case were not identical to those involved in an interference proceeding in the Patent Office between the same parties, the fact that supporting evidence in one might tend to impinge upon the other was not sufficient in absence of facts to support an inference that plaintiff was seeking to subvert the Rules of the Patent Office.

The key to the *Zimmerman* case was not, therefore, that the possibility that discovery in one action might impinge on the proceedings of another action was insufficient to restrict that discovery, as Respondent contends. Rather, the holding was that the defendants had failed to allege any facts that the plaintiff was seeking to subvert the Rules of the Patent Office.

In the present case, the broad exploration of matters intimately connected with the pending Board action, and only tangentially associated with the state suit, amply supports an inference that at least part of Respondent's purpose was to go around the Board's restrictive discovery rules, thereby, subverting the meaning and purpose behind these Rules.

It is this manner of utilizing liberal state discovery provisions to get around the Board's rules that leads directly to the question of whether through preemption, the Board's rule impliedly restricts the reach of the state court's discovery order.

Recently the Supreme Court has reviewed the doctrine of preemption in labor law cases in *Farmer* v. *Carpenters*, 430 U.S. 290 (1977). The *Farmer* case was a tort action brought in California state court for damages against unions and union officials alleging that they had intentionally caused the plaintiff to suffer severe emotional distress. In deciding this case, the Supreme Court recognized the competing interests which have shaped the doctrine of preemption as it related to labor law:

> On one hand, this Court has recognized that "the broad powers conferred by Congress upon the National Labor Relations Board to interpret and enforce the complex Labor Management Relations Act . . . necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate . . . ." On the other hand, because Congress has refrained from providing specific directions with respect to the scope of preempted state regulation, the Court has been unwilling to "declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions . . . ." *Farmer* v. *Carpenters, supra,* at 295-296. [Citations Omitted.]

The Court in *Farmer* went on to reaffirm the general rule regarding preemption which was formulated in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 at 244 (1959):

> When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

The Court recognized exceptions to the *Garmon* rule in appropriate classes of cases where the activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Farmer, supra* at 296-297, quoting *Garmon, supra* at 243-244. Among the exceptions to the preemption rule the Court has recognized are cases involving libel (*Linn* v. *United Plant Guard Work-*

ers, 383 U.S. 53 (1966)) and mass picketing and threats of violence (*Automobile Workers* v. *Russell*, 356 U.S. 634 (1958)).

Clearly, the suit brought in Arizona state court by Respondent would fall within the recognized exceptions to the preemption rule. However, the fact that a state court may properly exercise jurisdiction over the suit does not permit that court to determine the case without regard to the limitations imposed in furtherance of a national labor policy.

For example, to minimize the possibility that state libel suits would either dampen the free discussion characteristics of labor disputes or become a weapon of economic coercion, the Supreme Court in *Linn* adopted by analogy the standards enunciated in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), holding that state damage actions in the labor context would escape preemption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity. The Court also required that the plaintiff show the statements caused actual injury. Additionally, the Court stressed the responsibility of the trial judge to assure that the damages were not excessive.

In *Farmer* v. *Carpenters, supra* at 305, the Supreme Court imposed limitations upon actions for intentional infliction of emotional distress arising out of a labor setting because of the potential interference with federal regulation.

These cases clearly demonstrate that where a state court assumes jurisdiction over a case arising out of a labor setting, its jurisdiction is carefully circumscribed and the state court's actions remain subject to implied restrictions dictated by the potential of interference with the national labor policy — restrictions that would not be present in suits arising from non-labor related circumstances.

The Arizona discovery rules applicable in this case not only pose a potential for interference with the national labor policy, but directly conflict with the rules of the Board. Whether the Arizona rules are preempted, therefore, requires "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." *Farmer* v. *Carpenters, supra* at 300.

In modelling its discovery procedures upon the Federal Rules of Civil Procedure, Arizona revealed a similar purpose as that embodied in the Federal Rules of promoting judicial efficiency and to provide full disclosure of all facets of a law suit. (See generally, 4 Moore's Federal Practice, Paragraph 26.02.)

On the other hand, as noted previously, the rationale behind the Board's severe restriction of discovery is to protect ". . . witnesses and other persons with relevant information and to avoid the cost and inconvenience of full discovery." *P.S.C. Resources, Inc.* v. *N.L.R.B., supra* at 386-387. Furthermore, "The Board's procedures [restricting discovery] are reasonably designed to forestall such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." *N.L.R.B.* v. *Lizdale Knitting Mills, Inc.*, 523 F.2d 978, 980 (C.A. 2, 1975).

Additionally, allowing broad discovery of evidence pertaining to a matter pending before the Board would necessarily disrupt the Board's administration of the Act by providing litigants with advance knowledge of the substance of the General Counsel's case by resorting to the expedient of filing a concomitant civil suit in state court. In *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court viewed with disfavor the prospect of litigants using backdoor methods of gaining access to the substance of the General Counsel's case, viewing such conduct as an "interference" on the ground that such methods would permit "[E]ven without intimidation or harrassment a suspected violator with advance access to the Board's case would 'construct defenses which would permit violations to go unremedied.' " [Citations omitted.] *Id.* at 241. In *Robbins,* the Court refused to allow litigants to gain access under the Freedom of Information Act, to witnesses statements and affidavits made to the Board. It would hardly make sense to allow litigants to gain access to the substance of these statements through the use of state discovery procedures. Such a rule permitting such conduct would certainly promote the filing of suits, meritorious or not, in state courts to take advantage of discovery procedures not available to litigants in a Board proceeding. Therefore, it seems clear that such a result would definitely subvert the purpose and policy of the Board's rules and of the Act.

On the other hand, the potential interference with state regulation is minimal. A policy limiting discovery in state court actions, which are already subject to implied restrictions dictating by the supremacy of a national labor policy, until hearing on a matter involving essentially similar parties, witnesses and issues before the Board would not deny a litigant of a forum. At most, it would stay the proceding of the state action until the Board's hearing was held. Since, traditionally, Board proceedings are conducted at a more rapid pace and much sooner after the filing of the complaint than

is true in state civil suits, the delay to the state court action would not necessarily be burdensome.

Moreover, a litigant would not be altogether restricted in taking depositions, etc., but pending Board hearing, would be required to meet the "good cause" requirement of Rule 102.30 as interpreted by the Board's decisions.

On the balance, therefore, it appears that the federal interest underlying the Board's restrictive discovery rule is much greater than that which serves as the basis for the Arizona rule. Also, the danger of interference to the Board's Administration of the National Labor Relations Act by failing to limit the state court discovery procedures is very much greater than the potential for interference with the state proceedings. Reflecting this failure of the state's interests to adequately counterbalance the strong federal interest, it would seem imperative that any state court discovery order would necessarily contain within it by implication the Board's restrictive discovery rule regarding matters affecting a pending Board hearing.

Since the state court's jurisdiction was limited by the superior Board regulation, the state court's discovery order could not extend beyond th discovery permitted under Board procedures. When Respondent exceeded the implied limitations imposed by the Board's regulations, it was venturing into an area where its conduct was not protected by the state court discovery order and that order would not immunize that conduct from scrutiny by the Board. Since, as noted previously, the manner in which Respondent's attorneys interrogated (acting as its agents) could be considered coercive, it follows that the taking of the depositions of Helton and other employees and former employees of Respondent, in a manner which would not have been permitted by the Board, was a violation of Section 8(a)(1) of the Act.

The present case was not a situation in which counsel in taking depositions in an unrelated matter unwittingly crossed over into an area protected by the Act. On the contrary, Respondent's counsel was a capable and experienced labor attorney who was aware of exactly what he was doing when he specifically requested a court order allowing him to question Respondent's employees and former employees, subject only to the restriction that he not ask the witnesses about their statements to the Board, but with no restriction as to the substance embodied in those statements to the Board. Such circumstances strongly militate toward a conclusion that the conduct of Respondent's counsel constituted a violation of the Act. Accordingly, I find that Respondent, in furtherance of its civil action

threatened to depose and deposed employees, former employees and their spouses regarding the Union and concerted activities of its employees, including the Union and concerted activities of Helton, in violation of Section 8(a)(4) and (1) of the Act as alleged in Paragraph 14 of the complaint.

Conclusions of Law

1. Bill Johnson's Restaurants, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Myrland R. Helton on August 8, 1978, because of her union activities, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By interrogating an employee on August 10, 1978, regarding the union activities of other employees, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. On September 18, 1978, Respondent's employees Cheryl Nichols, Carla Scott and Dale Michaud ceased work concertedly and went out on strike in protest of the unlawful discharge of Helton, and at various times since said date, those employees, the spouses of certain employees and former employees of Respondent have picketed to protest the Respondent's unfair labor practices.

5. By threatening to bring reprisals upon employees for engaging in protected concerted activities, including the filing of a charge with the Board and the picketing of Respondent's premises, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

6. By making a veiled threat against the husband of an employee and his wife for having engaged in protected concerted activities, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(4) and (1) of the Act.

7. By interrogating a former employee on October 3, 1978 regarding said employee's union activities and her knowledge of the union activities of others, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(4) and (1) of the Act.

8. By filing a civil complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, against Myrland R. Helton, John Helton, Barbara Orr, Lawrence Orr, Cheryl

Nichols, Carl Nichols, Carla Marie Scott, Debra Mackie, Dale Michaud and Jane and John Does I through X, alleging the defendants made false and misleading statements with respect to a proceeding pending before the National Labor Relations Board, and with respect to other employee complaints against Respondent, and seeking to recover compensatory and punitive damages and an injunction against said individuals, which action was brought for the purpose of impeding the Board's processes and interfering with the prosecution of an unfair labor practice charge filed by Myrland R. Helton, the Respondent has violated Section 8(a)(4) and (1) of the Act.

9. By threatening to depose, and by deposing the defendants in the State of Arizona civil proceeding regarding the union and concerted activities of its employees, including those of Myrland R. Helton, the Respondent has violated Section 8(a)(4) and (1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be required to offer Myrland R. Helton immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of such discrimination, by payment of a sum of money equal to that which she normally would have earned as wages from the date of her discharge on August 8, 1978, to the date of said offer of reinstatement, less her net earnings during such period with backpay computed on a quarterly basis in the manner established by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and with interest hereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[25] It is also recommended that Respondent make available to the Board, upon request, all

---

[25] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

payroll and other records to facilitate checking the amount of earnings due. It has been found that the Respondent did not have a reasonable basis for the filing of a civil complaint in the Superior Court of Arizona, in and for the County of Maricopa, seeking damages and injunctive relief. It has further been found that the Respondent, in furtherance of its civil suit, threatened to depose and did depose employees, former employees and their spouses regarding the union and concerted activities of its employees. By such conduct, the Respondent has discriminated against its employees in the exercise of their right to file charges or otherwise give testimony under the Act, and has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act. In order to dissipate the effect of the Respondent's unfair labor practices, it shall be recommended that the Respondent cease and desist from prosecuting its complaint which arose out of Myrland R. Helton's filing of unfair labor practice charges with the National Labor Relations Board, and the concerted protected activities engaged in by its employees, former employees and their spouses, and that the Respondent be required to withdraw said civil complaint. In order to place Helton and the others who engaged in the picketing of Respondent's premises in the position they would have been absent the Respondent's Section 8(a)(4) and (1) violations, it is recommended that the Respondent make the defendants in the civil complaint whole for all legal expenses incurred in the defense of Respondent's lawsuit.[26]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[27]

ORDER

The Respondent, Bill Johnson's Restaurants, Inc., its officers, agents, successors and assigns, shall:

---

[26] *George A. Angle, supra; Power Systems, Inc., supra.*

[27] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging employees because of their union interest or activities.

(b) Interrogating employees or former employees regarding their union activities or the union activities of others.

(c) Threatening to bring reprisals upon employees or their spouses for filing a charge with the National Labor Relations Board or for picketing their premises, or for engaging in other protected concerted activities.

(d) Prosecuting its complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v. Myrland R. Helton, *et al.*, No. C375470, including threats to depose and deposing the defendants in said action.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Myrland R. Helton immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered as a result of the discrimination against her in the manner described above in the section entitled "The Remedy."

(b) Withdraw its complaint styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v. Myrland R. Helton, *et al.*, No. C375470, which Respondent caused to be instituted in the Superior Court of the State of Arizona in and for the County of Maricopa.

(c) Reimburse the Charging Party, Myrland R. Helton, and all other named party defendants, for all legal expenses incurred in the defense of said lawsuit, including expenses incurred in relation to Defendants' Answer and Counterclaim.

(d) Post at each of its restaurants located in Phoenix and Mesa, Arizona,[28] copies of the attached notice marked "Appen-

---

[28] As the temporary restraining order limited picketing at each of the Respondent's business establishments, I conclude it will best effectuate the policies of the Act to require the notice be posted at each of said premises.

dix."[29] Copies of said notice on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that Paragraph 8(b) of the complaint as amended in Case No. 28-CA-5041 be, and it hereby is, dismissed.

Dated: SEP 27 1979

/S/James S. Jenson

James S. Jenson
Administrative Law Judge

---

[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated Federal law, we hereby notify you that:

WE WILL NOT discharge employees because of their union or other protected concerted activities.

WE WILL NOT question any of our employees or former employees regarding their union activities or union activities of others.

WE WILL NOT threaten to bring reprisals upon employees or their spouses for the filing of charges with the National Labor Relations Board or for picketing our premises or for engaging in other protected concerted activities.

WE WILL NOT file a civil lawsuit against our employees, threaten to depose or depose them, for engaging in protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer to Myrland R. Helton immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other privileges, and WE WILL reimburse her for any loss of earnings she may have suffered because we discharged her, together with interest.

WE WILL withdraw the complaint styled as Bill Johnson's Restaurants, Inc., An Arizona Corporation, *et al.* v. Myrland R. Helton, *et al.*, No C375470, which we caused to be instituted in the Superior Court of the State of Arizona in and for the County of Maricopa, which we filed and maintained because Helton utilized the processes of the National Labor Relations Board, and WE WILL reimburse Myrland R. Helton and all other named party defendants for all legal expenses incurred in the defense of said lawsuit, including expenses incurred in relation to Defendants' Answer and Counterclaim.

BILL JOHNSON'S RESTAURANTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. 3030 N. Central Ave, 2nd Floor, Box 33069, Phoenix, AZ 85067 Telephone Number: (602) 261-4005.

Office - Supreme Court, U.S.
FILED
DEC 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

LAWRENCE ALLEN KATZ
Streich, Lang, Weeks & Cardon
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999
Counsel for Petitioner

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20503
(202) 633-2217
Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 28, 1982
CERTIORARI GRANTED OCTOBER 18, 1982

TABLE OF CONTENTS

	Page
DOCKET ENTRY IN THE COURT BELOW	1
Ninth Circuit's Order [of March 2, 1982, Amending Opinion and Denying Rehearing]	1
PORTIONS OF THE RECORD BEFORE THE NLRB ADMINISTRATIVE LAW JUDGE	2
Handbill Distributed by Demonstrators, Sept. 22, 1978	2
Complaint in Bill Johnson's Restaurants, Inc., *et al.* v. Helton, *et al.*, Maricopa County Superior Court No. C375470	3
State Court Plaintiffs' Motion to Shorten Time for Taking Depositions Upon Oral Examination and Order	10
State Court's Temporary Restraining Order	19
State Court Defendants' Motion to Expedite [Hearing on Motion for Protective Order]	22
State Court Defendants' Motion for Protective Order	24
Partial Transcript of Proceedings Before State Court Judge on Defendants' Motion for Protective Order	32
State Court Defendants' Answer and Counterclaim	40
State Court's Minute Entry *re* Preliminary Injunction, Nov. 16, 1978	52
Notice to Employees from Sherry Sturgeon (Christmas 1976)	52A

Page

PARTIAL TRANSCRIPT OF HEARING BEFORE NLRB ADMINISTRATIVE LAW JUDGE 53

ADDITIONAL DECISIONS AND ORDERS BELOW

The following items were reproduced pursuant to Rule 33.1 at the designated pages of the Petition for Certiorari:

Decision of the Ninth Circuit Court of Appeals A-3

Decision and Order of the National Labor Relations Board A-14

Decision of the Administrative Law Judge A-19

The material contained in the Joint Appendix has been reprinted exactly as it appeared in the record below, including typographical errors. Where an error may render the meaning of the sentence unclear, a "[sic]" has been inserted.

DOCKET ENTRY IN THE COURT BELOW

NINTH CIRCUIT'S ORDER [of March 2, 1982, Amending Opinion and Denying Rehearing]

[Caption deleted]

BEFORE: GOODWIN and CANBY, Circuit Judges and BYRNE, District Judge*

The opinion of this court in *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335 (9th Cir. 1981) (advance sheets), is modified as follows:

*****

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

---

*The Honorable William M. Byrne, United States District Judge for the Central District of California, sitting by designation.

PORTIONS OF THE RECORD BEFORE THE NLRB ADMINISTRATIVE LAW JUDGE

HANDBILL DISTRIBUTED BY DEMONSTRATORS, SEPT. 22, 1978

THE NATIONAL LABOR RELATIONS BOARD HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT, 3757 E. VAN BUREN STREET, FOR UNFAIR LABOR PRACTICES.

The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.

Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:

* Eight hour shifts with no specified breaks.
* No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.
* Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
* Inconsistent management practices.
* Unwarranted sexual advances.
* A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

COMPLAINT IN *BILL JOHNSON'S RESTAURANTS, INC., ET AL. v. HELTON, ET AL.*, Maricopa County Superior Court Cause No. C375470

[Caption deleted]

Plaintiffs, by their attorneys, Streich, Lang, Weeks & Cardon, P.A., allege for their Complaint:

I. COUNT ONE: WRONGFUL INTERFERENCE WITH BUSINESS

A. *The Parties*

1. *Corporate Plaintiff.* Bill Johnson's Restaurants, Inc., an Arizona corporation (hereinafter referred to as "the Restaurant"), is, and at all times relevant herein has been, a corporation duly organized and existing under the laws of the State of Arizona, having places of business in Phoenix and Mesa, Arizona, including one at 3757 East Van Buren Street, Phoenix, Arizona.

2. *Corporate Plaintiff's Business.* The corporate plaintiff herein has been engaged in the business of owning and operating family restaurants in Arizona for over 20 years. Gross sales in 1977 exceeded four million dollars, and current assets exceed two million dollars. Approximately 100 persons are employed at the Restaurant's Van Buren Street facilities, including about 40 waitresses.

3. *Individual Plaintiffs.* Johnny Johnson and Rudy Johnson are members of the family which founded and operates the Restaurant, and they are Vice-Presidents of the corporate plaintiff. Don Kalfas is a shareholder and the General Manager of the corporate plaintiff. Each of the named plaintiffs is employed by the corporate plaintiff for the purpose of managing and operating the Restaurant, and each fulfills those responsibilities on a full-time basis.

4. *Named Defendants.* The named individual defendants are, on information and belief, all residents of Arizona. None of the named defendants is an employee of the Restaurant.

5. *Unknown Defendants.* John Does I-X and Jane Does I-X are individuals whose true names and identities are unknown to

plaintiffs at this time and who have participated in, encouraged, incited and supported the unlawful and injurious acts hereafter described.

B. *Mass Picketing and Harrassment*

6. *Picketing Begins*. On Wednesday, September 20, 1978, from approximately 9:30 A.M. to 2:00 P.M., defendants Myrland Helton, Cheryl Nichols, Carl Nichols, Carla Marie Scott, Dale Michaud, and Debra Mackie demonstrated in front of plaintiffs' Van Burean Street Restaurant, carrying signs which accused the Restaurant of unspecified "unfair labor practices" and "prejudice." The signs and statements made by said defendants to customers, indicated that local waitresses were boycotting and striking the Restaurant, although no such boycott or strike was in progress.

7. *Picketing Continues*. On Thursday, September 21, 1978, from approximately 5:30 P.M. to 8:00 P.M., defendants Myrland Helton, John Helton, Cheryl Nichols, Carl Nichols, and Carla Marie Scott, together with the Helton's son and another unidentified child, engaged in the acts described in paragraph "6" above.

8. *Defendants Publish Defamatory Leaflets and Statements*. On Friday, September 22, 1978, from approximately 11:00 P.M. to 12:30 A.M., defendants Myrland Helton, John Helton, Cheryl Nichols, Barbara Orr, Lawrence Orr, and Carla Marie Scott, together with the Heltons' son and an unidentified man, appeared at the plaintiffs' Van Buren Street Restaurant and passed out leaflets to plaintiffs' employees and customers. One of these leaflets is attached to the Affidavit of Rudy Johnson, sworn to on September 25, 1978. The leaflets contained false and outrageous statements, including misrepresentations of proceedings pending before the National Labor Relations Board and accusations that the Restaurant's waitresses had complained about "unwarranted sexual advances" and about "a filthy restroom for women employees, with no soap, paper towels or toilet tissue provided." Additional outrageous and false statements maligning plaintiffs and their business were made orally by defendants to plaintiffs' employees and customers and to passersby and other persons.

9. *Interference with Plaintiffs' Operations*. During the picketing and leaflet distribution described above, defendants have

clogged the sidewalk in front of the Restaurant, making it inconvenient or difficult for other persons to pass, have shouted at and harrassed plaintiffs' customers, and have blocked ingress to and egress from the Restaurant. Some of the defendants have also harrassed plaintiffs' employees, in person and by telephone and have, on at least one occasion, coerced a job applicant into failing to appear for a scheduled interview at the Restaurant.

10. *Restaurant Continues to Operate*. Despite the defendants' activities described above, the plaintiffs have attempted to continue normal business operations.

11. *Potential for Violence*. The defendants' activities described above have engendered hostile reactions and tension among plaintiffs' employees and customers, and the defendants have intentionally provoked such reactions. Plaintiffs' employees and customers are concerned about their personal safety. On at least one occasion, plaintiffs felt it necessary to request assistance from the Phoenix Police Department and an officer was provided.

C. *Damage to Restaurant*

12. *Plaintiffs Have Suffered Loss of Business*. During and as a result of the defendants' activities described above, a substantial number of customers have, after entering the Restaurant parking lot or premises, departed without dining at the Restaurant. The exact number of such lost customers is difficult to ascertain, but plaintiffs believe the number to be in excess of 100.

13. *Damage to Reputation*. As a result of the defendants' activities described above, plaintiffs have suffered substantial and irreparable damage to their reputations and to the goodwill of their business. Such damage is not readily calculable in money terms.

D. *Defendants' Liability for Unlawful Acts*

14. *Unlawfulness of Acts*. The acts of the defendants, as described above, are tortious and unlawful and may be enjoined by this Court.

15. *Defendants' Participation in the Unlawful Acts*. Upon information and belief, each of the named individual defendants has

directed, authorized, encouraged, incited and participated in the unlawful acts described above.

16. *Irreparable Injury.* As a result of the unlawful acts of defendants described above, there is a continuous threat of serious violence, personal injury and property damage on or near plaintiffs' premises. Unless restrained, the defendants' acts create significant risks of injury to plaintiffs' employees, to plaintiffs' business, to plaintiffs' property, and to members of the general public. Said injuries would be substantial and irreparable.

17. *Greater Injury to Plaintiffs.* As to each and every item of relief sought herein, far greater injury will be inflicted upon plaintiffs and upon the public by the refusal to grant the relief sought than can conceivably be inflicted upon the defendants by the granting of such relief.

18. *No Adequate Remedy at Law.* Plaintiffs have no adequate remedy at law for the injuries inflicted and threatened by the activities herein complained of.

19. *Necessity for Restraint.* Upon information and belief, the unlawful acts complained of herein will continue to be committed unless restrained.

20. *No Prior Application.* No prior application for the relief sought herein or for similar relief has been made to this or any other court or judge.

II. COUNT TWO: LIBEL, BUSINESS DISPARAGEMENT

21. Each and every allegation contained in paragraphs "1" to "20" above is realleged and incorporated herein as if fully set forth.

22. *Injury to Business.* The leaflets, statements and other derogatory accusations made by defendants as described more fully above, tend to cause and have caused injury to the plaintiffs' business.

23. *Injury to Individual Plaintiffs.* The leaflets, statements and other derogatory accusations made by defendants, as described more fully above, have impeached the honesty, integrity and reputation of the individual plaintiffs.

24. *Publication by Defendants*. The defendants have published the aforesaid libelous statements by distributing documents containing the statements and by repeating the statements orally to plaintiffs' employees and customers and to other persons.

25. *Falsity of Defendants' Statements; Defendants' Malice*. The statements published by the defendants are false and misleading. Defendants published these statements knowing them to be false or in reckless disregard of whether they were false. Defendants knew the statements would injure plaintiffs, and defendants had a malicious intention to cause such injury.

WHEREFORE, plaintiffs pray that this Court:

1. Issue a temporary restraining order and preliminary injunction, the same to be made permanent on final judgment:

A. Restraining and enjoining the defendants and each of them, their officers, agents and employees, and all persons acting in concert or participation with them, from, in any manner or by any means,

(1) Entering upon plaintiffs' premises, or any portion thereof, for any reason without the express permission of the officer of plaintiff Restaurant in charge of such premises at the time, and refusing to vacate plaintiffs' premises when requested to do so by plaintiffs or their proper agents.

(2) Mass picketing, parading or demonstrating in proximity to plaintiffs' premises, *provided that* defendants shall be allowed, and shall be limited to, a total of four (4) individuals picketing, parading or demonstrating in a peaceful manner in proximity to plaintiffs' premises, and *provided further that* any such picketing, parading or demonstrating shall be conducted exclusively upon public property and not upon any property whatsoever owned by plaintiffs.

(3) Interfering in any way with the conduct of plaintiffs' business operations, including particularly but without limitation interfering in any way with the ingress and egress from plaintiffs' premises of plaintiffs' officers,

agents, employees, suppliers, customers, business contacts and deliverers of goods.

(4) Engaging in violence, threats of violence, harrassment or intimidation of any kind against plaintiffs' officers, agents, employees, suppliers, customers, business contacts or deliverers of goods, whether upon plaintiffs' premises or elsewhere.

(5) Publishing false and misleading statements concerning plaintiffs' business, officers, agents, employees, facilities or practices, including but not limited to allegations misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board as Case No. 28-CA-4970.

B. Further ordering that defendants named herein, and each of them, shall forthwith issue proper notice to all others acting in concert with them, publicly withdrawing and rescinding any orders, directions, requests or suggestions to do any of the acts restrained and enjoined under the foregoing paragraph; and that said defendants, and each of them, shall be responsible for supervising the orderly and lawful conduct of any and all persons participating in any picketing, parading or other demonstrations established or sponsored by said defendants in proximity to plaintiffs' premises, so as to insure compliance with the order of the Court;

C. Granting such other, further or different relief to which the plaintiffs may be entitled in the premises.

2. Grant final judgment against defendants and each of them for compensatory damages in such amount as the Court shall determine plaintiffs have suffered from the unlawful activities complained of to the date of final hearing.

3. Grant final judgment against defendants, and each of them, for punitive damages in the amount of $500,000.

4. Grant final judgment against defendants and each of them, as prayed for herein, with the costs and disbursements of this action, and provide such other and further relief in law and equity as may be appropriate in the premises.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By **Lawrence Allen Katz**
Lawrence Allen Katz
Nancy K. Splain

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Maricopa)

RUDY JOHNSON, being duly sworn, deposes and says:

1. I am Vice President of Bill Johnson's Restaurants, Inc., a corporation organized and existing under the laws of the State of Arizona, and I am one of the plaintiffs herein.

2. I have read the foregoing Complaint, and the allegations therein contained are true to my own knowledge except as to those matters therein alleged upon information and belief, which allegations I believe to be true.

Rudy Johnson
RUDY JOHNSON

SUBSCRIBED AND SWORN to before me this 25th day of September, 1978.

Sharon Lauzier
Notary Public

My Commission Expires:
2/28/79

STATE COURT PLAINTIFFS' MOTION TO SHORTEN TIME FOR TAKING DEPOSITIONS UPON ORAL EXAMINATION AND ORDER

[Caption deleted]

Plaintiffs, by and through their attorneys, Streich, Lang, Weeks & Cardon, P.A., pursuant to the provisions of Rule 30, Arizona Rules of Civil Procedure, hereby respectfully request this Court's order shortening the time for the taking of depositions upon oral examination.

Attached hereto and by this reference incorporated herein is a Memorandum of Points and Authorities in support of plaintiffs' Motion.

RESPECTFULLY SUBMITTED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

MEMORANDUM OF POINTS AND AUTHORITIES

Contemporaneous with the filing of the instant action, plaintiffs filed their application for a Temporary Restraining Order and Order to Show Cause, with affidavits in support thereof, requesting the Court to issue a Temporary Restraining Order restraining the defendants, and each of them, from trespassing upon plaintiffs' premises, mass picketing, interfering with the conduct of plaintiffs' business operations, engaging in violence or harrassment against plaintiffs, their officers, agents, employees, suppliers, or customers,

and from publishing false and misleading statements concerning plaintiffs or their business. Plaintiffs have also brought an Order to Show Cause seeking equivalent relief in the form of a preliminary injunction. In order to be fully prepared for the Order to Show Cause, plaintiffs herein respectfully request this Court's order shortening time for the taking of depositions.

As the pleadings on file with the Court indicate, none of the plaintiffs had any prior knowledge of the allegations and complaints that have been made by the defendants and which resulted in the actions plaintiffs seek to enjoin. Indeed, plaintiffs first learned of the complaints upon reading the handbills distributed by the defendants to plaintiffs' customers and employees. Plaintiffs have endeavored prior to the filing of their Complaint to determine as many facts as possible in order to consider the necessity and propriety of bringing this action. Nevertheless, because of the serious threat to the plaintiffs' business and reputation in the community posed by the defendants, plaintiffs were forced to act expeditiously and have been unable to obtain information which is in the possession of the defendants herein.

Rule 30(b)(3), Arizona Rules of Civil Procedure, provides that the Court may order that depositions be taken within a shorter period of time than stated in the Rule. In order that plaintiffs be fully apprised of the conditions and circumstances which resulted in the actions taken by all of the defendants and perhaps others, plaintiffs respectfully request this Court's order shortening time for the taking of depositions of those individuals named in notices attached hereto collectively as Exhibit "A," with the understanding that the depositions noticed for September 27 and 29, 1978, may be rescheduled for October 2 and 3, 1978, if those dates are more convenient to the witnesses that the dates reflected in the attached notices.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By **Lawrence Allen Katz**
Lawrence Allen Katz
Nancy K. Splain

ORDER

On Motion of the plaintiffs,

IT IS HEREBY ORDERED that the time for the taking of depositions of those individuals named in notices attached hereto collectively as Exhibit "A" shall be shortened, and that the depositions may be noticed for September 27 and 29, 1978, with the understanding that the depositions may be rescheduled on October 2 and 3, 1978, if those dates are more convenient to the witnesses than the dates reflected in the attached notices.

DONE IN OPEN COURT this 25th day of September, 1978.

Marilyn A. Riddel
JUDGE OF THE SUPERIOR COURT

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

MYRLAND HELTON

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Wednesday, the 27th day of September, 1978, at 1:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

JOHN HELTON

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Wednesday, the 27th day of September, 1978, at 3:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

BARBARA ORR

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 9:00 o'clock A.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

LAWRENCE ORR

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 10:00 o'clock A.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

DEBRA MACKIE

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 11:00 o'clock A.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

CARL NICHOLS

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 1:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS

& CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

CARLA MARIE SCOTT

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 2:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza

Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

CHERYL NICHOLS

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 3:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

NOTICE OF TAKING DEPOSITION

[Caption deleted]

TO: MYRLAND R. HELTON; JOHN HELTON; BARBARA ORR; LAWRENCE ORR; CHERYL NICHOLS; CARL NICHOLS; CARLA MARIE SCOTT; DEBRA MACKIE; DALE MICHAUD; and JANE DOES I thru X; and JOHN DOES I thru X.

PLEASE TAKE NOTICE that the deposition of

DALE MICHAUD

will be taken upon oral examination pursuant to the Arizona Rules of Civil Procedure on Friday, the 29th day of September, 1978, at 4:00 o'clock P.M., at the law offices of STREICH, LANG, WEEKS & CARDON, P.A., 2100 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003.

DATED this 25th day of September, 1978.

STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First National Bank Plaza
Post Office Box 471
Phoenix, Arizona 85001
Attorneys for Plaintiffs

By Lawrence Allen Katz
Lawrence Allen Katz
Nancy K. Splain

STATE COURT'S TEMPORARY RESTRAINING ORDER

[Caption deleted]

The Court having read the Plaintiffs' verified Complaint in this

action, together with the Affidavit of Rudy Johnson, the Vice-President of Plaintiff Restaurant, and the Affidavit of Lawrence A. Katz, Plaintiffs' attorney, both of which Affidavits were sworn to on September 25, 1978, it appears to this Court that this is a proper case for granting a Temporary Restraining Order; and that, unless the Temporary Restraining Order requested by Plaintiffs is granted forthwith, immediate and irreparable injury will result to Plaintiffs and to Plaintiffs' business and Plaintiffs' property located at 3757 East Van Buren Street, Phoenix, Arizona, and to Plaintiffs' agents and employees, and to citizens of the State of Arizona, which injury will include, without limitation:

a. Trespass by Defendants, and each of them and all those acting in concert with them, on the Plaintiffs' private property.

b. Violence, threats of violence, harrassment and intimidation by Defendants, and each of them, and all those acting in concert with them, directed against Plaintiffs' agents and employees engaged in the performance of their duties, and against Plaintiffs' customers.

c. Publication of false and misleading statements about Plaintiffs and Plaintiffs' agents and employees by Defendants, and each of them, and those acting in concert with them, directed at Plaintiffs' agents, employees and customers and intended to damage Plaintiffs' reputation and business.

d. Unlawful interference by Defendants, and each of them, and all those acting in concert with them, by and through all of the aforesaid methods, with the relationships between Plaintiffs and the agents and employees thereof desiring to work for Plaintiffs and between Plaintiffs and their customers.

e. Breaches of the peace by Defendants, and each of them, and all those acting in concert with them, and the danger of injury not only to Plaintiffs' property and to Plaintiffs' agents, employees and customers and their property, but also to innocent bystanders — all in derogation of the rights and interests of citizens of the State of Arizona.

It further appears to this Court that Plaintiffs have attempted

to give notice to Defendants by telephone of Plaintiffs' request for the immediate entry of this Temporary Restraining Order.

NOW, THEREFORE, based upon the foregoing, and upon the Plaintiffs' verified Complaint and the aforesaid Affidavits of Rudy Johnson and Lawrence A. Katz,

IT IS ORDERED, that Defendants, and each of them, and all those acting at their direction or in concert with them, be, and they hereby are, jointly and severally, restrained and enjoined from each and every one of the following:

a. Entering upon Plaintiffs' premises, or any portion thereof, for any reason without the express permission of the officer of Plaintiff Restaurant in charge of such premises at the time, and refusing to vacate Plaintiffs' premises when requested to do so by Plaintiffs or their proper agents.

b. Mass picketing, parading or demonstrating in proximity to Plaintiffs' premises, *provided that* Defendants shall be allowed, at any one establishment, and shall be limited to, a total of four (4) individuals picketing, parading, or demonstrating in a peaceful manner in proximity to Plaintiffs' premises, and *provided further that* any such picketing, parading or demonstrating shall be conducted exclusively upon public property and not upon any property whatsoever owned by Plaintiffs.

c. Interfering in any way with the ingress and egress from Plaintiffs' premises of Plaintiffs' officers, agents, employees, suppliers, customers, business contacts and deliverers of goods.

d. Engaging in violence, threats of violence, harrassment or intimidation of any kind against Plaintiffs' officers, agents, employees, suppliers, customers, business contacts or deliverers of goods, whether upon Plaintiffs' premises or elsewhere.

FURTHER ORDERED, that the Defendants named herein, and each of them, shall forthwith issue proper notice to all others acting in concert with them, publicly withdrawing and rescinding any orders, directions, requests or suggestions to do any of the acts restrained and enjoined under the foregoing paragraph of this Tem-

porary Restraining Order; and that said Defendants, and each of them, shall be responsible for supervising the orderly and lawful conduct of any and all persons participating in any picketing, parading or other demonstrations established or sponsored by said Defendants in proximity to Plaintiffs' premises, so as to insure compliance with the provisions of this Temporary Restraining Order.

FURTHER ORDERED, that any violation of this Temporary Restraining Order by any of the above-named Defendants, and each of them, and any and all others having notice of the terms of this Temporary Restraining Order, shall constitute contempt of this Court, and shall render any and all violators subject to punishment accordingly.

FURTHER ORDERED, that Plaintiffs shall give security in the sum of $500 upon the issuance of this Temporary Restraining Order as security for such damages as Defendants, and each of them, may incur if said Defendants, and each of them, are found to have been wrongfully restrained, such security to be deposited with the Clerk of this Court.

FURTHER ORDERED, that this Temporary Restraining Order shall be in full force and effect to and including the 5th day of October, 1978, unless its terms is [sic] extended by this Court or by stipulation of the parties, or unless it is dissolved prior to said date.

DONE IN OPEN COURT this 25th day of September, 1978, at the hour of 12:30 o'clock P.M.

Marilyn A. Riddel

JUDGE OF THE SUPERIOR COURT

STATE COURT DEFENDANTS' MOTION TO EXPEDITE [HEARING ON MOTION FOR PROTECTIVE ORDER]

[Caption deleted]

Defendants Helton, Nichols and Michaud, by and through their counsel undersigned, hereby move this Court for an Order Expediting hearing on their Motion for Protective Order. This Court has granted leave to the Plaintiffs to take depositions on October 2 and 3, 1978. Defendants' Motion for Protective Order relates to those

depositions. Accordingly, Defendants request hearing on their Motion for Protective Order prior to October 2, 1978.

DATED this 28 day of September, 1978.

WARD & CONTRERAS, LTD.

By: **David L. Niederdeppe**

Michael J. Keenan and
David L. Niederdeppe
316 West McDowell Road
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants Helton, Nichols and Michaud

ORDER

This Court having heard Defendants' Motion to Expedite Hearing, and good cause appearing,

IT IS ORDERED that hearing on Defendants' Motion for Protective Order shall be heard on the 29 day of September, 1978, at 8:30 A.M.

DONE IN OPEN COURT this 28 day of September, 1978.

Marilyn A. Riddel

The Honorable Marilyn Riddel
Judge of the Superior Court

Copy of the foregoing hand-delivered
this 28 day of September, 1978, to:

Lawrence A. Katz, Esq.
Streich, Lang, Weeks & Cardon
2100 First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003

David L. Niederdeppe

STATE COURT DEFENDANTS' MOTION FOR PROTECTIVE ORDER

[Caption deleted]

Defendants Helton, Nichols and Michaud, by and through their counsel undersigned, hereby move this Court for its Protective Order pursuant to Rule 26(c) of the Arizona Rules of Civil Procedure (hereinafter, A.R.C.P.). Defendants seek such an order *limiting the scope of examination* during the course of certain *depositions* noticed by Plaintiffs and expedited by this Court under the authority of A.R.C.P. Rule 30(a). The grounds for such an order are more fully set forth in the Memorandum accompanying this Motion. The Court's attention is respectfully directed to that Memorandum.

DATED this 28 day of September, 1978.

WARD & CONTRERAS, LTD.

By: David L. Niederdeppe

Michael J. Keenan and
David L. Niederdeppe
316 West McDowell Road
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

The Plaintiffs in this action seek discovery from the Defendants in the form of oral depositions *prior* to the expiration of A.R.C.P. Rule 30(a)'s 30-day time period during which leave of Court must be obtained. As is noted in the Motion, Plaintiffs have obtained such leave from the Court prior to the time Defendants obtained counsel. Plaintiffs requested leave for the early depositions on the grounds that discovery was needed "[i]n order to be fully prepared for the Order to Show Cause. . . ." In short, Plaintiffs apparently feel the need for such discovery to prepare for hearing on their

Application for Preliminary Injunction which is scheduled at the hour of 9:00 a.m. on October 5, 1978, before this Court.

Defendants move for a Protective Order which would *limit* the scope of examination by Plaintiffs during the depositions. The grounds for that Motion are threefold. First, Defendants submit that this Court's jurisdiction to issue *injunctive* relief is limited. Hence, the *scope of issues* at the hearing on Plaintiffs' Application for Preliminary Injunction is also limited. Accordingly, the *scope of examination* at depositions necessary to prepare for such a hearing *must be limited,* as well.

Second, the Defendants submit that by reason of the federal labor policy, the federal Freedom of Information Act [5 U.S.C. § 552] (hereinafter, "the FOIA"), and the decision of the United States Supreme Court in *NLRB v. Robbins Tire & Rubber Company,* ____ U.S. _____ 77-911, (Opinion June 15, 1978) (copy attached), the Defendants have a *privilege* which limits the scope of discovery available to the Plaintiffs. Such a privilege exists insofar as the Plaintiffs seeks to discover information relevant to the unfair labor practice charges filed by Defendant Myrland R. Helton against the corporation Plaintiff Bill Johnson's Restaurants, Inc. As noted below, hearing on the allegations contained in those charges is now pending at the National Labor Relations Board.*

Finally, certain of the Defendants in this action remain unrepresented. One of the basic purposes for A.R.C.P. Rule 30(a)'s 30-day limitation is to allow a Defendant to obtain counsel before depositions are taken. Depositions of such individuals should be precluded at the least until they obtain counsel.

Court's Limited Jurisdiction

At the outset, it should be noted that Defendants do not question the jurisdiction of this Court to issue injunctive relief in labor-relations situations where the alleged conduct sought to be enjoined includes violence and imminent threates to the public order. See *Youngdahl v. Rainfair,* 355 U.S. 131 (1957) and *Auto Workers v. Wisconsin Board,* 351 U.S. 266 (1956). Defendants believe that the

---

*Plaintiffs make reference in their Complaint to the NLRB charges at Page 8, lines 3 through 10.

evidence to be developed at the hearing on Plaintiffs' Application for Preliminary Injunction will reveal that no such conduct has occurred. However, in the abstract, this Court would have jurisdiction over such claims of violence and public disruption.

Defendants *do* question the jurisdiction of this Court to enjoin the Defendants from the series of acts explicity excluded from such equitable relief by A.R.S. § 12-1808(B)(1) through (6). Those Sections provide that a preliminary injunction or temporary restraining order issued in a labor relations matter may not prohibit a person from:

1. Terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do.

2. Attending at or near a house or place where any person resides or works, or carries on business, or happens to be, for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working.

3. Ceasing to patronize or to employ any party to such dispute or from recommending, advising, or persuading others by peaceful means to do so.

4. Paying or giving to or withholding from any person engaged in such dispute any strike benefits or other monies or things of value.

5. Peaceably assembling at any place in a lawful manner and for lawful purposes.

6. Doing any act or thing which might lawfully be done in the absence of such dispute by any other party thereto.

Hence, any matter relating to the type of conduct protected by A.R.S. § 12-1808 is *irrelevant* to the hearing on Plaintiffs' Application for Injunctive Relief, and so not necessary for preparation for that hearing. Discovery should be accordingly limited.

Further, the Defendants seriously question the jurisdiction of this Court to enjoin the conduct which is alleged in Plaintiffs' Complaint to constitute trade libel or business disparagement. Defendants submit that injunctive relief will *not* lie, because: (1) Plaintiffs have an adequate remedy at law, and (2) the First Constitutional Amend-

ment's proscriptions concerning freedom of speech *preclude* the type of "prior restraint" sought by Plaintiffs.

While Plaintiffs could locate no Arizona decisions concerning the jurisdiction of this Court to enjoin a libel, the vast weight of American authority is to the effect that equity will *not* restrain a mere libel or slander. This is so, even though the false statement may injure the Plaintiff in his business, profession or trade. In the absence of acts of *conspiracy, intimidation* or *coercion,* and where no breach of trust or contract appears, equity will not enjoin a libel because the party wronged has an adequate remedy at law by an action for damages or criminal prosecution. *Annot., Injunctions as Related in Cases of Trade Libel,* 148 A.L.R. 853 (1944); *Robert E. Hicks Corporation v. National Salesmens' Trade Association,* 19 F.2d 963 (7th Cir., 1927); 43-A, *C.J.S., Injunctions,* Section 143 (1978). See also *Am Jur* 2d, *Injunctions,* Section 137

The authority cited by Plaintiffs in their Memorandum in support of their Application for Preliminary Injunction and Temporary Restraining Order is clearly the minority view. The citations omitted by Plaintiffs as their quotation of the *Corrigan* case are to California law. While the case may express California law, it is not binding here.

Texas Courts have apparently recognize both sides of the question. In *Lawrence v. Atwood,* 295 S.W. 2d 298 (Tx.Civ.App., 19 ____), the Court held that neither the fact that the publication is being continued or will be continued unless restrained, nor the fact that such continued publication is and will be injurious to the libeled party's business, nor the two together, appear to be sufficient to render the rule inapplicable. This is in direct contrast to the Texas authority cited by Plaintiffs.

In *Martin v. Reynolds Metals Company,* 224 F.Supp. 978 (D.C. Ore., 1963), *appeal dismissed,* 336 F.2d 876 (9th Cir., 1964), *aff'd* 337 F.2d 780 (9th Cir., 1964), upon which Plaintiffs rely, the Court, while authorizing the injunctive relief sought, recognized the *crucial importance* of the First Amendment in such cases. The Court stated that the better-reasoned opinions concerning whether equity would enjoin trade libel *weigh* the adequacy of the remedy at law *and* the possible encroachment on *free speech rights* which might result

from the injunction. In labor relations matters, free speech is clearly the favored aspect.

The policy of the federal labor law has always been to encourage debate. Indeed, in *Thornhill v. Alabama*, 310 U.S. 88 (1941), the Supreme Court stated that, ". . . the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution."

Further, in *Letter Carriers, Old Dominion Branch, 496 v. Austin*, 418 U.S. 264, (1974), the Court *held* that the policy of the federal law is to favor *uninhibited, robust* and *wide-open debate* in labor disputes. The Court stated that the ". . . free-wheeling use of the written and spoken word . . ." had been expressly fostered by the Congress in the national labor law, and approved by the National Labor Relations Board. Hence, in labor relations matters, the element of *free speech* would raise the Constitutional objections to injunctive relief to a higher plane than they would be accorded in other actions. Defendants submit that even in those jurisdictions where alleged trade libels may be enjoined, the *free speech* aspect fostered and encouraged by the national labor policy would preclude injunctive relief. From the foregoing, it is clear that this Court has *no jurisdiction* to issue an order enjoining allegedly libelous statements. The Court has apparently agreed in the refusal to temporarily restrain the handbilling. Hearing on Plaintiffs' application for Preliminary Injunction should be limited to those matters over which the Court has jurisdiction. The Defendants request that this Court enter its Order so limiting the scope of examination at the scheduled depositions.

Under this approach, Plaintiffs would be free to inquire into the alleged acts of the Defendants over which this Court could exert its injunctive jurisdiction, if those actions were shown; i.e., violence or imminent threats of public disorder. Plaintiffs would also be free to *renotice* the depositions of Defendants *after* the expiration of the 30-day requirement of A.R.C.P. Rule 30(a), with respect to the *damage* aspects of the libel allegations. Depositions taken at that time would do no violence to the policy of A.R.C.P. Rule 30(a).

That policy is noted in Wright & Miller, *Federal Practice and Procedure*, Section 2104, with respect to the leave-of-Court re-

quirement of Rule 30(a) of the *Federal* Rules of Civil Procedure: "Most Courts have thought that leave should be granted only when some unusual circumstances or conditions existed that would be likely to prejudice the party if he were compelled to wait the required time." Since the only prejudice which could conceivably inhere to the Plaintiffs in this matter relates to the allegations over which the Court could *properly* exercise jurisdiction. The scope of the examination in depositions authorized *because* of that hearing should be limited to those matters.

Federal Labor Law Privileges

As is noted above, Plaintiffs' Complaint makes reference to an unfair labor practice charge filed at the National Labor Relations Board by Defendant Myrland R. Helton against the corporate Plaintiff. After its investigation, the National Labor Relations Board issued a Complaint against Bill Johnson's Restaurants, Inc., alleging violation of the National Labor Relations Act. Hearing on the allegations set forth in that Complaint is set for December 7, 1978.

In connection with the NLRB investigation of the charges made by Defendant Helton, certain of the Defendants here presented evidence to NLRB agents. Defendants believe that the federal labor policy givesn them a *privilege* with respect to evidence supporting the unfair labor practice charge, and request the Court to so limit discovery. If such an order does not issue, the Plaintiff will be able to do violence to the federal policy by obtaining *indirectly* what it could not get *directly*.

Section 6 of the National Labor Relations Act provides that the National Labor Relations Board may make rules and regulations necessary to carry out the provisions of the Act [29 U.S.C. § 156]. Historically, the NLRB has provided little pre-hearing discovery in unfair labor practice proceedings. The reasons for the Board's general *refusal to make discovery available to parties charged with unfair labor practices* is that employers or, in some cases, Union, will *coerce* or *intimidate* employees and others who have given statements in an effort to make them change their testimony or to not testify at all. As noted by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co., supra.*, this special dangeer flowing from pre-hearing discovery in NLRB proceedings has been recognized by the Courts for many years. See *NLRB v. Vapor Blast Manufacturing*

Co., 287 F.2d 402, 407 (7th Cir., 19 ____); *cert. denied* 368 U.S. 823 (1961).

The FOIA would make statements given to the Labor Board discoverable were it not for Section 7(A) of the Act, which provides that disclosure is not required of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings." In *NLRB v. Robbins Tire & Rubber, supra.*, the Supreme Court held that witness statements in *pending* unfair labor practice proceedings are *exempt* from FOIA disclosure, *at least until completion of the NLRB's hearing*. The Court so held because the release of such statements necessarily would involve the kind of harm that Congress believed would constitute an "interference" with NLRB enforcement proceedings — that of giving a party litigant *earlier* and *greater* access to the NLRB's case than he would otherwise have.

If the Plaintiffs are allowed to examine the Defendants here with respect to knowledge in their possession which relates to the unfair labor practice charges, the Plaintiff will have been able to obtain by indirect means that which it could not obtain by direct means. Defendants submit that the historical labor policy and Exemption 7(A) of the FOIA, as construed by the Court in *NLRB v. Robbins Tire & Rubber, supra.*, establish, for the purposes of this action, a *privilege* on the part of the Defendant which is *as broad as the subject matter of the unfair labor practice Complaint itself.* A copy of that Complaint is attached to this Memorandum.

As is noted above, such a privilege must remain in effect *at least* until completion of the NLRB's hearing. Until such time, the privilege as set forth above should operate to *preclude* the Plaintiff in this action (which is the Charged Party in the unfair labor practice proceeding) from obtaining discovery of matters *relevant to that Labor Board matter.* Defendants request this Court to enter its Order limiting the scope of discovery prior to the hearing to *preclude* inquiry into the matters set forth in the unfair labor practice Complaint.

Defendants Without Counsel

Certain Defendants in this action remain unrepresented. As is noted by Wright & Miller, *Federal Practice and Procedure*, Section

2104, Rule 30(a) of the *Federal* Rules of Civil Procedure (like in substance to the Arizona Rules) allows a certain time period before depositions may be taken. One of the reasons for this time period is to assure the Defendants of an opportunity to retain counsel and inform themselves as to the nature of the suit. With such reasons behind the 30-day requirement of Rule 30(a), the Court's Protective Order should *preclude* Plaintiffs from deposing *any of* those Defendants who remain unrepresented in this action.

CONCLUSION

For the foregoing reasons, the Defendants request this Court to issue its Protective Order in accordance with the authorities outlined above.

RESPECTFULLY SUBMITTED this 28 day of September, 1978.

WARD & CONTRERAS, LTD.

By: David L. Niederdeppe

Michael J. Keenan and
David L. Niederdeppe
316 West McDowell
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants
Helton, Nichols and Michaud

Copy of the foregoing hand-delivered
this 28 day of September, 1978 to:

Lawrence A. Katz, Esq.
Streich, Lang, Weeks, & Cardon
2100 First National Bank Plaza
100 West Washington
Phoenix, Arizona 85003

David L. Niederdeppe

PARTIAL TRANSCRIPT OF PROCEEDINGS BEFORE STATE COURT JUDGE ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER

[Pages 6–21]

MR. NIEDERDEPPE [Attorney for State Court Defendants]: Your Honor, if you had a chance to review the Motion for Protective Order which was filed I won't go into a great deal on that, other than to note that it is our belief that the underlying purposes of this lawsuit are two-fold.

First, to chill the exercise of defendants of their First Amendment Rights and their rights under the National Labor Relations Act, Section 7, which gives them the right to engage in concerted activity for their benefit.

Secondarily, we believe to procure the kind of discovery which the National Labor Relations Board would not allow to the plaintiffs in that pending action. And, our Response, our Motion speaks to both of those issues.

It is our belief that the Court has no jurisdiction to issue an injunction which would prohibit or restrain the exercise by these defendants of First Amendment Rights.

If that is so, then the hearing on the Order to Show Cause is likewise limited. Since the plaintiffs in this action seek discovery to prepare for that hearing, we feel that the scope of discovery should be so limited.

Now, we feel that Rule 30 and its 30 day requirement would preclude the taking of depositions which would delve into other areas for that time period, because a trial may be pending on these allegations two years from now as to the damage aspect.

With respect to the injunction aspect of the allegation, we feel the scope should be at this time limited.

With respect to the second major thrust of the Motion for Protective Order, which is the position that the National Labor policy is to preclude this kind of discovery. I would note that the plaintiff's Response states that they have no desire to ask for the statements given by the individuals to the National Labor Relations Board.

However, if they are allowed to delve into the same area by way of deposition, the same result would be accomplished.

The plaintiffs state that the Robbins Tire and Rubber case, the case which was attached and the Freedom of Information Act speak only to those statements. That is true. However, the policy of the National Labor Relations Board has historically been to preclude discovery in these kinds of proceedings. That policy, in conjunction with the Robbins case and with the Freedom of Information Act Exception 7A, we believe give to those — these defendants, rather, a privilege until after the hearing to refuse to answer questions related to that particular proceedings.

One final note, I would — I don't have other copies of this case. I have come across a case which speaks to this type of situation and holds that an injunction is not a proper remedy for libel and one of the statements made in this case is that, "Statements describing unsanitary working conditions and alleging a lack of morals of supervisory personnel of an employer did not constitute a trade libel which would justify an injunction."

That statement seems to speak to exactly the situation in this case.

The case is Montgomery Ward vs. Department Store Employees of America. The citation is 400 Illinois 38, 79 Northeastern Reporter 2d 46. And, I have just one copy of the case that I could make available to whoever would care to examine it.

THE COURT: All right. Thank you.

Mr. Katz?

MR. KATZ [Attorney for Plaintiff Restaurant]: Your Honor, on approximately 20 hours notice what we have received is a thinly disguised Motion for Summary Judgment. I think the Motion is premature and inappropriate.

The defendants have attacked the merits of this case and they have sought to appeal from this Court's prior order.

As far as the issues they have raised in their brief, I do not believe there is any genuine dispute as to the Court's right to enjoin non-peaceful picketing and other massed assemblage.

The complaint before the Court seeks to enjoin non-peaceful activities.

The facts indicating whether or not the activities, which are complained of as having occurred in the past and as having been threatened to continue, those facts will be brought out at the hearing appropriately and the discovery is for the purpose of bringing out such facts.

Part of the action is, of course, a libel action also and as to that the defendants have raised claims of Constitutional issues of free speech and prior restraint First Amendment Rights. That is merely a smoke screen. There is no Constitutional Right to libel another person.

We are not seeking to limit or restrain in a prior fashion. We are seeking an injunction against a leaflet which has already been distributed. We are seeking to have it no longer distributed.

As far as the privilege they have alleged, Linn vs. United Plant Guard Workers points out, I think, on page 56 of the Supreme Court decision that there is no right to libel anyone else. There is no privilege under the Constitution.

As far as the Robbins case in the U.S. Supreme Court, that was a suit by employer under the Freedom of Information Act to compel the National Labor Relations Board to release certain statements they had obtained. They are not a party. We seek to release no such statements.

All we seek to do is, in normal discovery, is to ask the defendants for the facts behind the leaflets they distributed. We want to go through each and every fact in the leaflet and ask them, "Why did you make this accusation? What facts do you have to believe the accusation is true?"

We need that discovery in order to prepare for this proceeding if there is a question as to whether the Court has the right to issue preliminary relief. Part of the answer to that question will depend upon the facts that come out through discovery.

I would assume that the Court's decision as to whether to issue a preliminary injunctive relief might vary from case to case, depending on each fact situation.

All we want to do is get the facts necessary and supply the information to this Court.

Thank you, Your Honor. Nothing else.

THE COURT: Mr. Niederdeppe?

MR. NIEDERDEPPE: If I may respond briefly.

This Motion for Protective Order has been described as a thinly disguised or camouflaged Motion for Summary Judgment.

There is no seeking an order ending this action. There is no facts upon which we rely, at this stage, that the Court could decide, as a matter of law, that this action should be decided in the defendants' favor.

As I read the pleadings, I think the pleadings probably state a cause of action for the elements alleged. We haven't sought to block that.

With respect to the allegation in that complaint of mass pickets or violence, we concur if that kind of conduct occurred it may certainly be enjoined by this Court. And, the plaintiffs are certainly not precluded from investigating and taking deposition testimony with respect to those allegations.

We do feel that this Court may not enjoin the First Amendment Rights of these individuals and that, therefore, is not relevant to the hearing on the Order to Show Cause and the 30 day requirement of Rule 30A should be accorded the defendants on that point.

Finally, I would just note, and I pointed this out in the Motion, to the strong policy of the Labor Act encouraging freedom of speech, the line of cases from Thornhill vs. Alabama through the Linn case, which makes reference to that and to a later case which qualified Linn, which is Old Dominion Branch Number 496 of the Letter Carriers vs. Austin. It's a Supreme Court case and I don't have the citation. I think I may have cited it in the Motion.

That case holds that the Federal Labor laws favor an uninhibited, robust and wide open debate in these type of labor disputes.

That's exactly what occurred here. We feel the Court can't enjoin that kind of activity.

MR. KATZ: One further point?

THE COURT: Surely.

MR. KATZ: Defendants have expressed concern as to how we will utilize whatever we discover in these depositions. The issue, of course, before the Court is, will the discovery be relevant to this proceeding? If it is relevant to this proceeding, then the fact that it might be relevant to some other proceeding in some other forum is immaterial.

The only issue that is presented before you today is whether what we seek to ask in discovery is relevant to the proceedings before you now. We submit that it is.

THE COURT: Mr. Niederdeppe, it is your motion, you are entitled to the last word if you would like to have it.

MR. NIEDERDEPPE: I think I must say something.

With respect to the allegations of the complaint respecting libel, we concur that investigation, by way of deposition, interrogatories, or whatever methods under the discovery rules is proper with respect to libel. We are asking for the 30 day requirement of Rule 30A to be prepared.

We think such short notice where depositions are being taken four, five days after the complaint is filed if the issues on the hearing of temporary restraining order are limited, the discovery which is needed should be limited. That is all we are saying.

We are saying, with respect to the matters material to the labor case, the National Labor Relations Board case, that there is a privilege.

We are not denying that it may have relevance here. We are saying that until that hearing is held, the labor policy, the Freedom of Information Act and the Robbins case give these defendants that privilege.

THE COURT: If I read the complaint, or whatever the document is, from the NLRB, entitled that was attached to your Motion, the allegation made is that this young lady was fired because she was attempting to organize union activity. That is what came through in that complaint. I think that is what the hearing in December is going to involve.

MR. NIEDERDEPPE: That's correct.

THE COURT: That issue, that she was fired for that reason and thus subject to the NLRB and some disciplinary action or some adjudication.

The issues in this matter, as I see them are quite different and it will be the ruling of this Court denying the Motion for Protective Order. However, the allegations regarding union organizing and the statements made to any investigators in that case may not be inquired into. But, certainly the allegations regarding the other matters in the pamphlet may be inquired into.

MR. KATZ: May I seek clarification, Your Honor?

THE COURT: Yes.

MR. KATZ: The pamphlet contains numerous statements which we would like to inquire into.

One of the statements in the pamphlet is that Miss Helton was fired when she suggested to the waitresses that they should organize a union. That statement is similar to the statement that was made in the Linn case.

If I may refer Your Honor to that case. Reading from the pamphlet, the leaflet that was issued by the union in that case the following quotations appeared in that leaflet, "The men in Saginaw were deprived of their right to vote in three NLRB elections. Their names were not submitted. These guards were voted into the union in 1959. These Pinkerton guards were robbed of any pay increases. The Pinkerton managers were lying to us all the time the contract was in effect."

It goes a little further but I am stopping there.

Many of the allegations had been the subject of unfair labor practice charges before the Board, but I assume, since the U.S. Supreme Court said that a libel action in state court would properly lie, based on those allegations, that there would be no denial of discovery into the truth or falsity into those allegations.

We seek to ask questions regarding the truth or falsity of all the accusations made in the leaflet, regardless of whether or not those accusations appear in some other forum. That does not appear to us to be material to this particular case.

THE COURT: Your memorandum seemed to indicate that it

was the unwarranted sexual advances and a filthy restroom that you wished to inquire into and not the allegations regarding the NLRB proceeding.

MR. KATZ: If I may refer Your Honor to line 10 on page 2 of the memorandum. Part of the libelous statement is the defendants' have accused the plaintiffs of violating the law. They have accused us of discharging the defendant, Miss Helton, because she suggested to the waitresses they should organize a union. That is a violation of law and that is so perceived by our customers.

We believe Miss Helton made the statement knowing it to be false, making it with the intention of injuring us in our business and was done so maliciously.

Had she not distributed that pamphlet, had she kept her charges to the appropriate federal agency there might not have been a libel question, because she would be privileged to file the charges with the agency.

Having made the particular statement public, we have a right to defend and protect our reputation by asking the facts, why she made the statements to a public agency as opposed to some other forum.

MR. NIEDERDEPPE: I would merely point out that Linn vs. United Plant Guard Workers to which the plaintiffs have reference was a case which was not involving an injunction prior to the Board hearing.

It involved an action for damages which, of necessity, would be sometime later than the hearing.

All we are asking in terms of the labor privilege is what the Labor Board would give us, these individuals, that is to preclude discovery until the time of hearing, December 7th.

We are not asking that they never be able to try the issues, that is not the question.

THE COURT: Do you agree, pending the hearing, no more dissemation [sic] of that statement will be made?

MR. NIEDERDEPPE: I am sorry?

THE COURT: Do you likewise agree that prior, pending the

hearing in December, that your clients will no longer dissemate [sic] that statement publicly?

MR. NIEDERDEPPE: With respect to the National Labor Relations Board?

THE COURT: You betcha.

MR. NIEDERDEPPE: Would that be one of the conditions of the Court's order?

THE COURT: I am asking.

MR. NIEDERDEPPE: I am just saying we don't see that it would be of necessity.

THE COURT: The Motion for Protective Order then is denied as to these three sets of defendants. Those are the only ones to whom the ruling goes.

The other orders remain in full force and effect.

MR. KATZ: Is there then, Your Honor, any limitation on the —?

THE COURT: There is not, so long as it is relevant to the allegations made in this complaint.

It will be my ruling that if any witness, other than one of these parties, were asked about statements made to the NLRB, or that these parties were asked about statements made to the NLRB investigators that that would not be a proper question, but you may question them regarding the statements made publicly in Maricopa County, and the basis for those statements.

MR. KATZ: I understand. Thank you, Your Honor.

MR. NIEDERDEPPE: May I clarify?

I take it you have denied in totality the Motion for Protective Order?

THE COURT: I have.

MR. NIEDERDEPPE: So, if the plaintiffs in this matter delve into areas which are relevant to the Labor Board's complaint, in other words, whether or not this individual was fired for her union activity that is not protected?

THE COURT: The ruling is that the plaintiffs may inquire about any of the allegations made in this complaint.

They may not inquire as to what statements were made to NLRB investigators. That's not an allegation here that they falsely told an NLRB investigator something. That's not why we are here. And, they may not inquire or the answer may be refused as to what statements were made to NLRB people in that case by whom or who made the statements.

They may inquire as to the statements made in Maricopa County in this dissemination as to any matters regarding that statement, who they were made to, what the basis for it is, what facts they have to sustain the statements made in that publication in Maricopa County.

MR. NIEDERDEPPE: Thank you, Your Honor.

MR. KATZ: Thank you, Your Honor.

THE COURT: Yes, indeed. Have a good day.

We will stand in recess.

(Whereupon, the above proceedings were terminated.)

I, BRIDGET BRITTAN, Official Court Reporter herein do hereby certify that the foregoing 20 pages constitute a full, true and accurate transcript of the proceedings had in this matter on September 29, 1978, all done to the best of my skill and ability.

DATED this 29th day of September, 1978.

Bridget Brittan

BRIDGET BRITTAN
Official Court Reporter

STATE COURT DEFENDANTS' ANSWER AND COUNTERCLAIM

[Caption deleted]

Defendants, for their Answer to Plaintiffs' Complaint, admit, deny and allege as follows:

I

Defendants admit the allegations of Paragraphs 1, 2 and 3 of the Complaint.

II

Answering Paragraph 4 of the Plaintiffs' Complaint, Defendants admit that they are residents of the State of Arizona. However, Defendants deny, generally and specifically, each and every additional allegation of Paragraph 4.

III

Answering Paragraph 6 of the Complaint, Defendants admit that they picketed on the public sidewalk in front of Plaintiffs' Van Buren Street restaurant; that certain of the picket signs contained, among other things, the slogans "unfair labor practices," and "prejudice." Further, Defendants admit that they asked customers and potential customers of the Big Apple Restaurant to support them in their dispute with the restaurant by withholding their patronage until the dispute had been halted. Such conduct is clearly permitted under A.R.S. § 12-1808. Defendants deny each and every additional allegation of Paragraph 6.

IV

Answering Paragraph 7 of the Complaint, Defendants admit that they picketed on the public sidewalk at the Van Buren Street restaurant on September 21, 1978; that the Defendants named in Paragraph 7 were present for all or part of such picketing activity. Further, Defendants incorporate their Answer to Paragraph 6 of the Complaint by reference herein, and they expressly deny each and every allegation not specifically admitted in their response to Paragraphs 6 and 7.

V

Answering Paragraph 8 of the Complaint, Defendants admit that those Defendants named in Paragraph 8 of the Complaint did picket and distribute a limited number of handbills (Exhibit A to

Affidavit of Rudy Johnson) at public sidewalks in front of the Plaintiffs' Van Buren Street Restaurant. Defendants deny, all and singular, each and every additional allegation of Paragraph 8.

VI

Defendants deny, all and singular, each and every allegation contained in Paragraphs 5, 9, 11, 13, 14, 15, 16, 17, 18, 19 and 20 of the Complaint.

VII

Answering Paragraphs 10 and 12 of the Complaint, Defendants are without sufficient knowledge with which to form a belief as to the truth or falsity of the allegations contained therein, and therefore Defendants deny the same.

Count II — Libel Business Disparagement

I

Answering Count II of the Complaint, Defendants adopt by reference and incorporate herein all of the admissions, denials, and allegations set forth in their Answer to Count I of the Complaint.

II

Defendants deny, all and singular, each and every allegation contained in Paragraphs 22 through 25 of the Complaint.

III

Defendants deny each and every allegation of Plaintiffs' Complaint not specifically admitted or denied herein.

AFFIRMATIVE DEFENSES

I

Defendants allege that Plaintiffs have failed to state a claim upon which relief may be granted.

II

Defendants further affirmatively allege that this Court lacks jurisdiction over the subject matter of the Complaint, the same having been pre-empted by the National Labor Relations Act.

III

Defendants further affirmatively allege that, under the provisions of the First Amendment to the United States Constitution, Section 7 of the National Labor Relations Act [29 U.S.C. § 157], Sections 4 and 7 of the Norris-LaGuardia Act [29 U.S.C. § 104 and § 107], and Section 12-1808 of the Arizona Revised Statutes, they acted lawfully in picketing and handbilling at Plaintiffs' premises to truthfully advise the public of the existence of a dispute between employees and former employees of Plaintiff Bill Johnson's Restaurant, Inc. and Plaintiff.

IV

Defendants further affirmatively allege that the statements made by way of the picket signs, handbills, and conversations with customers and potential customers were truthful and that each of the Defendants believed the statements to be true at the time they were made.

WHEREFORE, Defendants respectfully request that the Complaint be dismissed in its entirety, that the Temporary Restraining Order issued on September 25, 1978 be dissolved, that the Order to Show Cause issued on September 25, 1978 be quashed, that Defendants be awarded their costs of suit; and that Defendants be awarded reasonable and actual attorneys' fees incurred in the defense of this matter.

COUNTERCLAIM

Myrland R. Helton, John Helton, Barbara Orr, Lawrence Orr, Cheryl Nichols, Carl Nichols, Carla Marie Scott, Debra Mackie, and Dale Michaud, hereinafter Counterclaimants, for their counterclaims allege as follows:

I

Bill Johnson's Restaurants, Inc., an Arizona corporation; Johnny Johnson and Jane Doe Johnson, his wife; Rudy Johnson and Jane Doe Johnson, his wife; Don Kalfas and Marilyn Kalfas, his wife; Loginna Jean Johnson and John Doe Johnson, her husband; Sherry Sturgeon and John Doe Sturgeon, her husband; Dina Cameron and John Doe Cameron, her husband; Suzy Gay and John Doe Gay, her husband, a/k/a Lenny Walters; John Does I through X and Jane Does I through X, individuals whose names and identities are unknown at this time and who will be named after their identities become known, were at all times pertinent to this complaint acting for themselves individually and for and on behalf of all other Counterdefendants, hereinafter "the Family." Each of the husband-wife Defendants constitutes a single marital community.

II

Counterclaimants and Counterdefendants are residents of the State of Arizona or are presently existing corporations duly qualified and licensed to do business in Arizona; and the unlawful actions which are the basis of this complaint were perpetrated by "the Family" in Arizona.

III

On or about August 8, 1978, Myrland Ruth Helton was discharged from her employment at the Big Apple East, a restaurant where she had been employed as a waitress for seven and one-half years by "the Family."

IV

Mrs. Helton, prior to her discharge, had been actively engaged in activities protected by federal law; to wit: discussing the forming of a union with fellow employees. Determining this to be the cause of her discharge by "the Family," Mrs. Helton filed a charge with the National Labor Relations Board (The Board). The Board issued a Complaint on September 20, 1978, alleging that Mrs. Helton had been terminated because of her union activities.

V

Fellow employees of Mrs. Helton were told by "the Family" to inform Mrs. Helton's customers that "she had quit work to return to school." Mrs. Helton's fellow employees were told that Mrs. Helton was discharged for not complying with company regulations.

VI

By mid-September, 1978, the fellow employees of Mrs. Helton had become aware of what company regulations Mrs. Helton was alleged to have violated. These company regulations were as follows: (a) employees were not to chew gum while working; (b) employees were not to use the company phone for private use; (c) employees were to call in on a designated off-work day of each week referred to as a "call day" fifteen minutes prior to their shift.

VII

Mrs. Helton's fellow employees knew of their own knowledge that Mrs. Helton had not violated any of the aforementioned company policies prior to her discharge. They believed, as well, that the company regulations dealing with private use of the company phone and calling in on a call day had been countermanded by the immediate supervisor of Mrs. Helton's shift, the breakfast shift, and that no one on the breakfast shift felt obliged to comply with any of these regulations.

VIII

On September 18, 1978, believing that Mrs. Helton was discharged for union activities rather than the reasons given by the management, and knowing that "the Family" refused reinstatement, the majority of Mrs. Helton's work shift walked off the job in her support.

IX

On September 29, 1978, Defendants and Counterclaimants began picketing at the Big Apple East.

X

Shortly after the picketing began, Counterdefendant Sherry Sturgeon, a member of management, approached the picketers and confronted them with foul and abusive language, threats and obscene hand signs. She told Counterclaimants that it was the intention of "the Family" to "make you pay for this."

XI

Picketing continued on September 21, 1978 and September 22, 1978. Picketing did not exceed five hours on any of these days. On these three occasions, and on every occasion since, Counterclaimants have conducted themselves in a manner beyond reproach. Counterclaimants have never crowded the sidewalks in front of the restaurant or made it difficult for pedestrians to pass. Counterclaimants have not shouted at, harassed, or threatened employees of the restaurant or its customers or potential customers. At no time have the picketers blocked ingress or egress from the restaurant.

XII

On Friday, September 22, 1978, Counterclaimants distributed several handbills to passers-by listing their grievances. Counterclaimants knew of their own knowledge and belief that everything contained in the leaflet was true. They distributed these leaflets in an effort to educate the public as to what abuses they and others had suffered at the hands of "the Family" in the hope that doing so would aid in preventing such abuses in the future.

XIII

At all times relevant hereto, "the Family" was aware of the facts set forth in Paragraph XI preceding this paragraph. They were aware as well of the truthfulness of the statements set forth in the handbills distributed by the picketers. Yet, on September 25, 1978, "the Family" caused to be filed in the Superior Court of the State of Arizona, Maricopa County, the lawsuit of which this Counterclaim has become a part demanding punitive damages of One half Million Dollars ($500,000) plus compensatory damages, claiming that statements set forth in the leaflets distributed by Counter-

claimants were false and libelous and that Counterclaimants had harassed their employees and customers and potential customers This litigation declared also that Counterclaimants had blocked ingress and egress from the restaurant and had clogged the sidewalks in front of the restaurant. Along with the complaint, "the Family" requested a restraining order against Counterclaimants.

XIV

Counterclaimants believe this litigation is and was an attempt by "the Family" to use the Court system to harass, intimidate, terrorize and break down Counterclaimants. It appeared to be the attitude of "the Family" that its former employees could not afford or would not seek legal counsel and therefore would be manipulated to the point where Counterclaimants would discontinue exercising their right of freedom of speech without "the Family" having to correct its wrongdoing.

XV

As a result of the filing and processing of the lawsuit, Counterclaimants have suffered ridicule, emotional distress, limited employment opportunities. Counterclaimants cannot calculate the exact amount of damages at this time, but such damages will be proven at trial.

XVI

Counterdefendants' actions constitute a willful and deliberate abuse of process and a malicious prosecution designed to restrain Counterclaimants in the exercise of rights guaranteed under the Constitution and law of the State of Arizona and of the United States.

WHEREFORE, for this obvious and malicious abuse of process, Counterclaimants pray Judgment in an amount of compensatory damages to be proven at trial, plus exemplary damages in the sum of Two Million Dollars ($2,000,000), together with Counterclaimants' costs and reasonable attorneys' fees.

COUNTERCLAIM II

Each and every allegation contained in Paragraph I through XVI above is hereby realleged and incorporated herein as if fully set forth.

XVII

On October 25, 1978, "the Family" sought and received from the Superior Court a Temporary Restraining Order and Preliminary Injunction which hindered and limited Counterclaimants in exercising their civil rights and more specifically, those rights granted by Amendment I to the United States Constitution and A.R.S. Constitution Article 2, § 6, and § 12-1808 of the Arizona Revised Statutes.

XVIII

This Temporary Restraining Order and Preliminary Injunction limited the number of Counterclaimants who could picket at any one restaurant location at any given time. This meant, of course, that when four Counterclaimants were exercising their freedom of speech by picketing and/or handbilling in front of the Counterdefendants' Big Apple East restaurant, the other five Counterclaimants could not exercise their freedom of speech at this location and therefore were deprived of the same.

XIX

Although "the Family" spend several days prior to September 25, 1978, in the preparation of its litigation and request for Temporary Restraining Order and Preliminary Injunction, "the Family" did not notice in any way, shape or form the majority of Counterclaimants that a Temporary Restraining Order hearing was to take place and gave no more than one hour and ten minutes notice to the two Counterclaimants it did notice. The two Counterclaimants who were noticed of the hearing were noticed by telephone.

XX

In presenting its request for a Temporary Restraining Order and Preliminary Injunction to the Court, "the Family" knew or should have known that the picketing was peaceful, the handbills truthful and the conduct free of any violence, threats of violence, or obstruction of ingress and egress from the restaurant.

XXI

By wrongfully securing a Temporary Restraining Order against Counterclaimants, Counterdefendants have interfered with and restrained Counterclaimants in the exercise of rights granted under law; they have subjected Counterclaimants to ridicule; they have limited Counterclaimants' future employment opportunities, and they have forced Counterclaimants to pay substantial attorneys' fees and Court costs. Counterclaimants cannot ascertain at this time the extent of their compensatory damages except that they have incurred costs and attorneys' fees to date in excess of Four Thousand Dollars ($4,000).

XXII

Further, Counterdefendants' actions were willful, malicious, and conscious efforts designed to secure a wrongful Injunction.

WHEREFORE, Counterclaimants pray that they be awarded compensatory damages to be proven at trial, plus the sum of Two Million Dollars ($2,000,000) as and for exemplary damages, and costs and attorneys' fees pursuant to A.R.S. § 12-341.01.

COUNTERCLAIM III

Each and every allegation contained in Paragraphs I through XXII is realleged as if fully set forth.

XXIII

Since on or about August 8, 1978, Counterdefendants have slandered and published numerous libelous statements regarding the actions and motives of Counterclaimants. These libelous statements include a letter distributed by Counterdefendants to employees on

or about September 25, 1978. A true and correct copy of said publication is attached hereto as Exhibit A. [Exhibit omitted.]

XXIV

Counterdefendants knew the statements made in the slanderous and libelous publication were untrue and the statements were made with reckless disregard for their truth. Further, Counterdefendants' conduct was willful and malicious.

XXV

As a result of the libel and slander perpetrated by the Counterdefendants, Counterclaimants have been subjected to ridicule, humiliation, loss of employment opportunities and damage to their reputations. Counterclaimants are unable at this time to ascertain the amounts of damages which they have suffered as a result of Counterdefendants' libelous and slanderous statements.

WHEREFORE, Counterclaimants pray Judgment in an amount of compensatory damages to be proven at trial, for exemplary damages in the amount of Two Million Dollars ($2,000,000) and for all costs and reasonable attorneys' fees and for such other relief as to the Court appears just and proper in the premises.

WARD & CONTRERAS, LTD.

By: Michael J. Keenan

Michael J. Keenan
316 West McDowell Road
Suite 203
Phoenix, Arizona 85003
Attorneys for Defendants and
Counterclaimants

Copy of the foregoing delivered
this 13 day of November, 1978, to:

Lawrence A. Katz, Esq.
STREICH, LANG WEEKS & CARDON
2100 First National Bank Plaza
Phoenix, Arizona 85003

Michael J. Keenan
Michael J. Keenan

STATE OF ARIZONA)
) ss.
County of Maricopa)

WITNESSETH, the undersigned, for and on behalf of the Counter-claimants, being first duly sworn, verifies that she has read the foregoing Counterclaim, verifies that the account which is the basis of this Complaint is just and true, and that all facts stated herein are true and correct.

Myrland R. Helton
Affiant

SUBSCRIBED AND SWORN TO before me this 13th day of November, 1978.

My Commission Expires: 10-5-79

Gayle M. Weber
Notary Public

STATE COURT'S MINUTE ENTRY *RE* PRELIMINARY INJUNCTION, NOV. 16, 1978

[Caption deleted]

12:05 p.m. Order to Show Cause. Plaintiff represented by counsel, Lawrence A. Katz. Defendants are represented by counsel, Michael J. Keenan.

Court reporter, Bridget Brittan, is present.

Plaintiff's case:

Rudy Johnson is sworn and testifies.

Plaintiff's Exhibits 1, 2, 3 and 4 are marked for identification and received in evidence — photographs.

Sherry Sturgeon is sworn and testifies.

Marilyn Kalfas is sworn and testifies.

Lois Williams is sworn and testifies.

George P. Bolen is sworn and testifies.

Ruth Helton is sworn and testifies.

Plaintiff rests.

Defendant's counsel moves that the Temporary Restraining Order be dissolved, the Order to Show Cause quashed and the Application for Preliminary Injunction denied.

Based on the evidence presented, the Court finds there is insufficient evidence that would warrant the issuance of a Preliminary Injunction.

Ordered denying Request for Preliminary Injunction and dissolving the Temporary Restraining Order.

Day Girls -

Saturday Jan 1 all 10-6 girls will work 9-5!

Don't forget!!

Also

Anyone not coming to work Friday, Sat, or Sunday will be terminated.

There is NO Exception

Thank You

Shirley

PARTIAL TRANSCRIPT OF HEARING BEFORE NLRB ADMINISTRATIVE LAW JUDGE

[Pages 33-51]

MICHAEL KEENAN

was called as a witness by and on behalf of the General Counsel and having been first duly sworn on oath, was examined and testified as follows, to-wit:

THE WITNESS: Your Honor, may I make a preliminary statement before I begin to testify?

JUDGE JENSON: All right. Give us your name and your address, first, please.

THE WITNESS: My name is Michael J. Keenan. My address is 316 West McDowell Road, Phoenix, Arizona.

Your Honor, I'm here pursuant to a subpoena. I, as you know, am representing the charging party and others in Superior Court proceedings. I haven't at this point entered an appearance in the Board case, nor do I intend to. My particular problem, of course, with this case is that there's going to be a great deal of interplay between my testimony and having to refuse to answer questions because of the attorney client priviledge, and I want to make it clear on the record that my clients have not waived the attorney client priviledge and to the extent I answer questions which in my judgment are not priviledged, it's not my intention nor should it be construed that any of these answers constitute a waiver of the attorney client priviledge.

MR. PETTIBONE [Attorney for Board]: Your Honor, I would like to apologize to the Court for calling Mr. Keenan to the stand, out of turn chronologically. However, he as he previously stated has to be before the Ninth Circuit in Los Angeles tomorrow and is leaving for there this afternoon. So, I beg your permission to let him testify first.

JUDGE JENSON: Go ahead.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Mr. Keenan, what is your occupation?

A. I'm an attorney.

Q. Do you know a Myrland R. Helton?

A. Yes, I do. I'm representing Mrs. Helton in connection with a Superior Court lawsuit.

Q. Is that Superior Court in the State of Arizona?

A. Yes, it is.

Q. Maricopa County?

A. Yes.

Q. When did you first meet Mrs. Helton.

A. I believe it was the Tuesday, the 26th of September, in the afternoon. Mrs. Helton came into my office.

Q. This year?

A. Yes, sir.

Q. Okay. Can you please tell us why she came to you?

A. She was referred to me by a client to — for the purpose of securing our firm to handle the Superior Court action which at that point consisted of a Temporary Restraining Order which had been issued by the Court on the 25th and a damage action, liable [sic] action which was part of the same proceedings.

Q. Did your firm agree to represent her?

A. Yes, we did on that day agree to represent Mrs. Helton and subsequently we undertook to represent all nine (9) of the defendants in that lawsuit.

Q. At the time Mrs. Helton — or at the time you agreed to represent Mrs. Helton, can you please tell us what, at that time, was the status of the lawsuit, in addition to the TRO?

A. Well, the restraining order had been granted with some modifications by Judge Rudell [sic] on the previous day, Monday morning I believe. That would have been September 25, 1978. And, of course, no appearances had been entered by any counsel and I believe a hearing was set on the Temporary Restraining Order for the following week, I think it was October 5th, although I'm not certain of the date.

Q. You say a hearing was set on the Temporary Restraining Order.

A. Application for Preliminary Injunction.

Q. Thank you. At the time Mrs. Helton visited you at your offices were depositions scheduled?

A. Yes, they were. At the time Mr. Katz secured the Temporary Restraining Order, I believe he also got the Judge to sign an Order expediting discovery and he had set depositions for the afternoon of Wednesday the 27th and the morning and afternoon of Friday, the 29th. Again, all these dates are '78 unless I indicate otherwise.

Q. Okay, and you said Mr. Katz, is that the same Mr. Katz that is here?

A. Larry Katz who was representing the company and who filed along with Nancy Splain the lawsuit and other papers.

Q. And is that the same Mr. Katz who's here today representing the Respondent?

A. Yes, it is.

Q. Were the depositions held as scheduled at that point?

A. No, they were not. The Order had, I don't recall the exact words, but some alternative dates for the scheduling depositions, and October 2nd and 3rd, I believe which would have been the following Monday and Tuesday. I called Mr. Katz on the 27th and advised him I was representing the Heltons and I believe at that time, Cheryl and Carl Nichols and that it looked as though we'd be representing all the defendants and that I would take advantage of his, or of the Court's order and postpone the depositions until the following week.

Q. Would you please tell us who said what during that phone conversation?

A. Well, as I recall there two conversations between Mr. Katz and I and I think there was a third conversation between Mr. Niederdeppe and my office and Mr. Katz. The first one, I believe, Larry may have called me and said I understand you're representing the Helton's. I don't remember who called whom. And, I don't remember too much of the conversation — too many of the specifics. I do remember the topics we discussed. One of which was the of course, the setting of the depositions, we also discussed the kinds

of questions he was going to ask in the depositions. Mrs. Helton had advised me that a Complaint had been issued in connection with the first of the cases, I don't know the number off hand, but the 883 case. And, I was concerned that he was going to use — during the course of the deposition to get into some of the matters that were the subject of testimony of Mrs. Helton and some of the others in the 883 case. So, we had a discussion about what he believed was relevant to the liable [sic] lawsuit particularly in relation to one paragraph of the handbill which had been distributed by Mrs. Helton and the other picketers. And, I think that the language was something to the effect that Ruth Helton had been terminated by the Big Apple Restaurant, Bill Johnson's Inc., on August the 8th after she had talked to other waitresses about forming a union. Larry and I had a fundemental difference as to what that paragraph meant. I told him that I didn't think there would be any problem with his asking questions about the sequence of events, mainly that Mrs. Helton had talked to people about forming a union prior to August the 8th and thereafter she was fired, but he said that the word after should be construed as because and that for that reason he felt it was relevant to go into the facts Mrs. Helton relied upon in determining that she had been fired for union activity. I told him at that point that I thought we would probably be filing a Protective Order Motion to limit the testimony of Mrs. Helton and others. I think all nine (9) of the defendants at that point had been scheduled for depositions. And, in fact, on Friday the 27th or 29th of September, two (2) of the depositions had been taken, Barbara Orr and Larry Orr, but the problem didn't really materialize there because Barbara Orr had terminated her employment several months before these events gave rise to the 883 case.

Q. In your disucssion with Mr. Katz on the phone, you testified that you discussed the scheduling of depositions. Did you discuss the scheduling of Mrs. Helton's deposition?

A. Well, yeah. I believe Larry wanted because of scheduling problems and primarily he indicated scheduling problems, he wanted to get Ruth Helton's deposition out of the way first thing Friday. I think he also indicated that after taking Mrs. Helton's deposition, there may not be need to take all nine of the defendants' depositions. And, I think I responded that because we were concerned about the scope of the examination, we might be filing a Protective Order

Motion and we'd need the additional time. So, I think we then, during one of these two conversations set a deposition schedule for everyone but the Orrs who had shown up on Friday, beginning on Monday morning with Mrs. Helton at 9:00 o'clock and Mr. Helton thereafter, and I forget the sequence after that.

Q. How about the second conversation, could you tell us briefly what that involved?

A. Well, I think we closed the first conversation with our discussion about whether or not we would try to limit the scope of his discovery, and he said he would write down the questions and call me back and let me know what questions he anticipated to ask. He did call me back, probably forty-five (45) minutes later, and he read me several questions. I can't remember the specifics of the questions, but they were all framed around the idea what facts did you rely upon in making the statement on the leaflet that you had been discharged because of union actvities, or after having talked about union activities. After he read those questions, I said that in my judgment that we would probably be moving to get a Protective Order from Judge Rudell [sic] to limit the discovery, because I felt that he was kind of using a back door approach to get —

MR. KATZ: Objection to any testimony about why Mr. Keenan took certain actions and what his legal reasons were for those actions. I think it's irrelevant to this proceeding.

JUDGE JENSON: I'll overrule.

BY MR. PETTIBONE:

Q. Mr. Keenan, was the — a Motion for Protective Order filed by your office?

A. Yes, it was. At that point, I asked Dave Neiderdeppe who's an associate in our firm to prepare the papers and take care of the argument or the Motion. We discussed the types of questions, Mr. Katz was asking, and I think that Dave then called Larry Katz and discussed the questions once again to see whether or not there was any prospect of limiting the questioning without our going after a Protective Order and Motion.

Q. Do you recall when the Motion was filed?

A. I think it was filed either Wednesday, the 27th of September

or Thursday the 28th. I know the hearing was set for Friday morning at 8:30 on the 29th of September.

JUDGE JENSON: What Order are you talking about?

MR. PETTIBONE: It's the — Motion, I may have said Order, I'm sorry. The Motion for Protective Order. Your Honor, with your permission, I'd like to raise those calendars to get a better view of what days occur when.

JUDGE JENSON: Okay.

BY MR. PETTIBONE:

Q. Mr. Keenan, as a result of the filing of the Motion for Protective Order, what happened?

A. Well, Judge Rudell [sic] essentially denied our Motion and agreed with Mr. Katz's theory that the types of questions relating to the facts upon which Mrs. Helton relied in contending that she was discharged for union activity was relevant to the lawsuit because it had been mentioned on the allegedly liabless [sic] handbill.

Q. Did she make her ruling after a hearing?

A. Well, after oral argument, yes. The Motion was filed and the hearing was expedited and then Mr. Katz and Mr. Niederdeppe argued before Judge Rudell [sic] on Friday morning the 29th at 8:30 a.m., I think.

Q. Okay, was Mrs. Helton's deposition taken?

A. Yes, it was taken, before I go on I might say that the Judge also ordered in addition to agreeing with Mr. Katz's theory, she entered an Order that Mr. Katz was not permitted to go into the substance of any statements given to the NLRB. Mrs. Helton's deposition, in answer to your question, was eventually taken. It was taken about 9:00 a.m. on Monday the 2nd of August, or October.

Q. Were there any other depositions taken at that day?

A. Yes, there were. There were two (2) additional depositions taken that afternoon, John Helton and — was the next in order and Johnny Johnson, who's an official of Bill Johnson's restaurants deposition was also taken that day.

Q. Okay, who is John Helton?

A. John Helton is Ruth Helton's husband. He was also named as a defendant in the civil court lawsuit.

Q. Other than the depositions of the Orrs which you previously mentioned, were the depositions of any other named defendants taken before that of Mrs. Helton?

A. No, they weren't. I believe they were scheduled for the afternoon of the 2nd and the morning of the 3rd because we still had the October 5th hearing date to contend with and we were trying to get the depositions taken.

Q. During the taking of Mrs. Helton's deposition, was she asked to respond to questions regarding her union activities?

A. Yes, I believe she was.

Q. Can you tell us what happened after her deposition was taken?

A. Well, the deposition was completed probably somewhere between 11:30 and noon, and we decided to postpone the other depositions until after the noon hour. At that point, I think Mr. Katz asked me to step into his office. He wanted to talk to me, and we discussed and I think, attorney client priviledge, Your Honor, would prohibit me from talking about the substance of the conversation, but one of the topics a — was a possible settlement.

Q. Okay. During the discussion was the taking of the remaining depositions also discussed?

A. Yes, it was. We at that point, began talking about putting off the October 5th hearing.

Q. That's the hearing I assume on the Preliminary Injunction?

A. Yeah, and rescheduling the depositions to some time prior to the new hearing date.

Q. Was the hearing postponed?

A. It was after we had — I had agreed to convey the settlement offer to my clients and we determined that we'd need more time than the three (3) days which we had. So, we agreed to stipulate to continue the Restraining Order as modified by Judge Rudell [sic], in effect, until, I believe it was the 14th of October, I don't know if I'm clear on that date.

Q. Do you recall, was that hearing on the request for a Preliminary Injunction postponed once or more than once?

A. It was postponed twice by stipulation and once by the Court because of scheduling problems. It was postponed twice by stipulation between Mr. Katz and myself, and on both of those occasions we agreed to extend the TRO as modified, Restraining Order.

Q. And, were the depositions rescheduled?

A. Yes, they were. They were finally — I can't recall exactly when they were taken. Some were never taken. There were a couple of — at least one of the defendants deposition was never taken because she moved to New York. I believe they were taken the 10th of November and the 13th of November, because by this time we reset the hearing for the second time to the 14th of November.

Q. Which of the defendants had moved to New York?

A. Debby Makey had to go back for surgery and she's still in New York as I understand it.

Q. During the depositions of the other defendants, were they asked questions about any union activities of Ruth Helton?

A. Yes, they were, I believe. I'm sure they were. In fact, Miss Splain and I — Miss Splain took several of the depositions and we each made a statement on the record as to what we believed the admissability of that sort of testimony was and in light of Judge Rudell's [sic] Order. And, I think that's all a matter of record. Those statements were all made on the record at the depositions.

MR. PETTIBONE: Your Honor, may I approach the witness?

JUDGE JENSON: Of course.

BY MR. PETTIBONE:

Q. Mr. Keenan, I'm going to hand you a rather large accumulation of documents. Have you seen that before?

JUDGE JENSON: Show a copy to Mr. Katz.

MR. PETTIBONE: I'm sorry, Your Honor.

A. Yes, I have had an opportunity to look these over before the hearing. I've seen everything except the index of General Counsel's Exhibit 2.

Q. That's the top page?

A. Yes.

Q. Okay, and are all of the documents contained therein your papers filed by the parties in the State Court action or Orders or transcripts of proceedings before the Court?

A. Yes, I believe that Exhibit h is — I'm not sure whether it's a complete transcript of the deposition of Mrs. Helton, but I — there are several depositions and I can't say for certain that these are complete. I didn't look through them. But, with that qualification, I believe all of these papers were either filed with the Court or by the Court or transcripts of proceedings related to those — to the Court action.

MR. PETTIBONE: Your Honor, at this time I move for the introduction of General Counsel's 2 to — 2(a) through 2(j) into evidence.

JUDGE JENSON: Now, what is it? These are the State Court proceedings?

MR. PETTIBONE: Right.

JUDGE JENSON: Any objections?

MR. KATZ: Yes, we do have objection in part. Items (a) through (e) on the list and item (i) are not objected to. (a) through (e) and (i) are not objected to. We object to item (f) as irrelevant for the counsel — for the General Counsel to introduce the Motion and the supporting memorandum of the defendants in the case has no bearing on any issues related to the restaurant's bringing of the lawsuit. And, their intent and their purpose and their basis from bringing the lawsuit. It would be just a self-serving document to present to this Court. And, of course, they haven't presented the documents filed by the restaurant only those filed by the defendants. So, it's irrelevant and it's only partial, and therefore it's objectionable on both grounds. Item (g) is also irrelevant. The transcript of proceedings on the Motion for Protective Order doesn't have any relevance to the issue before this Court now which was the respondent's intent and purpose in bringing the lawsuit initially and finally on — excuse me, not finally, next to finally, Item (h) copies of pertinent portions of the transcripts, I think it's objectionable not to submit the entire transcript but just to select portions chosen, I

assume, with a particular purpose in mind, presents an incomplete picture and is therefore objectionable. Finally, now, Item (j) we also feel is irrelevant, what the Court did several months after the bringing of the lawsuit in terms of the Preliminary Injunction, has no bearing on the issues before this Court including whether the Respondent, the restaurant had a reasonable basis for bringing the suit at the time it was filed. We would ask that (a) through (e) and (i) be left attached to the Exhibit and that the objectionable sections of this Exhibit be removed.

MR. PETTIBONE: Your Honor, would you care for a response?

JUDGE JENSON: Yes.

MR. PETTIBONE: First of all General Counsel's Exhibit 2(f), Respondent has objected on the basis of relevancy. The Defendant's memorandum of points and authorities, which I believe is objectionable primarily too. He has offered for picture of completeness to show the Respondent's to show the reasons for the Respondent's thereto, which is included thereto in the exhibit. That is included in Exhibit 2(f). 2(f) although it's helpful, it isn't completely understandable I don't believe without seeing what it is responding to, which is why Defendant's memorandum was included.

JUDGE JENSON: Well, do you intend to introduce certain documents with respect to the Court proceedings, too.

MR. KATZ: I can't answer that at this time, Your Honor, until I see what they present.

JUDGE JENSON: Well, this is about an inch thick and I haven't had a chance to read it yet.

MR. PETTIBONE: Your Honor, would you like me to respond to the other items as well?

JUDGE JENSON: Okay.

MR. PETTIBONE: Okay. The Exhibit 2(g), which Respondent has objected to as irrelevant. That is a copy of the transcript of proceedings on the Motion for Protective Order. It is very relevant. It is the General Counsel's position, that that transcript reveals the basis for the Respondent's claim that the handbill was liabless[sic]. And, also reveals that the claim was frivolous and a sham and only

a means of obtaining discovery of the General Counsel's case, Case number 4970. Argument of counsel there for the Respondent reveals the true motive. And, that's why General Counsel has included that in the Exhibit.

With respect to (h), —

JUDGE JENSON: Before you go on, off of (g), am I getting, do I just have a poor copy here or is this thin paper?

MR. PETTIBONE: It's thin paper, Your Honor. The bold faceprint is the print on that page and what's printing through is the print on behind pages.

JUDGE JENSON: All right, go ahead.

MR. PETTIBONE: With respect to General Counsel's Exhibit 2(h), I believe Respondent objected that the — objected to the fact that only portions of the depositions included. I did that because I didn't want to go through the trouble of photocopying the entire thing, and including them and make an overwhelming document. If Respondent wishes to introduce the remaining portions of those depositions, I would have no objection.

With respect to Exhibit 2 — I believe that takes us to Exhibit 2(j), I offered that only for completeness, that is what the Judge did with the hearing for the Preliminary Injunction. I just thought it would help in giving us a complete picture, for that reason I thought it was relevant.

JUDGE JENSON: Well, the only thing that really bothers me about it, is (h) copies of what you consider the pertinent portions of the transcripts. The rest, of course, I haven't looked at it. I don't know whether it's relevant or whether it isn't. But sometime I would have to read it to find out if it is or isn't relevant, but for the purposes of going on with the hearing now, I'm going to receive all but (h) and at such time as I do have an opportunity to go through this, I'll have to determine whether the rest of it is relevant or not. I don't know right now. So, I guess you'll just have to trust me to make such a determination.

MR. PETTIBONE: Your Honor, may we go off the record for a minute?

JUDGE JENSON: Wait a minute. Now, so far as (h) goes, the

transcript of the depositions, I would assume the two (2) of you can come to some agreement on that. Is what is in here pertinent or is it not and is there other pertinent material. You two can discuss that off the record.

MR. PETTIBONE: Your Honor, are we still on the record?

JUDGE JENSON: Yes.

MR. PETTIBONE: As I said before, if Respondent wishes to introduce the remaining portions, we would have no objection.

JUDGE JENSON: Well, let's see if you can't come to an agreement with respect to (h). (h) is not received at this point, it's reserved.

(The documents previously marked as 2(a) through 2(j) for identification were received in evidence, except 2(h), which was rejected.)

[Pages 52–57]

CROSS EXAMINATION

BY MR. KATZ [Attorney for Restaurant]:

Q. Michael, may I call you Michael? Do you recognize that document?

A.[By Michael Keenan] Yes, I do. I am told that this is the handbill which was distributed on a couple of days in September, I believe the 22nd was the first day, and also for a short time as I understand it on the 26th of September.

Q. Is this an accurate copy of that document?

A. Yes, this is the — this is an accurate copy of the copy which was attached to your Complaint.

MR. KATZ: We'd like to offer that in evidence as Respondent's Exhibit 1 or 3 or whatever.

JUDGE JENSON: Respondent's 1.

(The document previously referred to

was marked as Respondent's Exhibit No. 1 for identification.)

JUDGE JENSON: Any objection?

MR. PETTIBONE: No objection, Your Honor.

JUDGE JENSON: Received.

(The document previously marked as Respondent's Exhibit No. 1 for identification was received in evidence.)

BY MR. KATZ:

Q. You say that this document was attached to the Complaint that was filed in the State Court proceedings?

A. Yes, it was.

Q. Were you present during most of the depositions that were taken by Respondent in connection with that State Court proceeding?

A. I believe I was present during all of the depositions.

Q. And, was this leaflet the subject of questions asked during the depositions?

A. Yes, I think the leaflet was the subject of questions asked of all the witnesses on both sides, and they were numerous as I recall. They were probably twelve (12) to thirteen (13) depositions taken.

Q. Now, the second paragraph in Respondent's Exhibit 1, refers to Miss Helton's discharge. Were the questions asked during the deposition about Miss Helton's discharge in reference to this paragraph? In Respondent's Exhibit 1?

A. Well, as you know, they were in reference to your construction of the paragraph which I strongly disagreed throughout the proceedings, namely that the word after should be replaced by the word, before on line 3 of the second paragraph.

Q. Okay, Did you also take depositions?

A. I did.

Q. And, do you recall how many you took?

A. I believe I took four (4) of them.

Q. Do you remember whose depositions you took?

A. John Johnson, Rudy Johnson, Don Kalfas and Suzie Gay, I believe those were the only ones.

Q. During those depositions, did you ask questions which were calculated to determine whether they had any knowledge of Miss Helton's union activities?

A. I asked questions after first making a preliminary statement that because I was unsure of what Judge Rudell's [sic] Order indicated and because I was — because of your construction of this paragraph, I was put in the position of having to defend it in the liable [sic] actions, that I would go into that area, yes. I don't think I asked it of all of them, just a couple.

MR. KATZ: Your Honor, I'd like to move that Mr. Keenan's testimony is non-responsive to the question, that I just asked and also should be stricken. And, I'd ask that he respond to the specific question that was asked.

JUDGE JENSON: I thought he did.

MR. KATZ: I didn't ask him what his reasons were for asking questions, I asked whether he asked the questions or not.

JUDGE JENSON: Well, denied. Go ahead.

BY MR. KATZ:

Q. Referring you to General Counsel's Exhibit No. 2, Item (g) is a transcript of proceedings on the Motion for Protective Order before Judge Rudell [sic].

JUDGE JENSON: Which one now?

MR. KATZ: Item (g) in Exhibit No. 2.

BY MR. KATZ:

Q. Of that two (2) pages of that transcript include provisions setting forth the Judge's ruling and begin on page 19, line 6, where the Judge begins by saying, "It will be my ruling," and that continues on to line 14, and then the Judge begins again on line 25, and says, "The ruling is as follows," and then it goes over to the next page line 15. I ask that you read that ruling for a moment to refresh your recollection. Is that transcript a faithful reproduction of the Judge's ruling as you remember it?

A. Well, as I testified earlier, I wasn't present at this hearing. David Neiderdeppe was — it's an accurate transcription of the transcript I read several weeks ago.

Q. All right. When you participated in the depositions, and I believe you testified that you were in each of the depositions that Respondents took.

A. I believe so.

Q. Did the Respondents comply with that ruling of the Judge?

MR. PETTIBONE: Objection, Your Honor. He's asking Mr. Keenan to make a conclusion — to draw a legal conclusion. As Mr. Keenan has stated, the parties are in disagreement as to whether the questions posed by Respondent's counsel in those depositions were within the Order. Mr. Keenan has already testified to that, and for Mr. Katz to ask him now, whether or not the questions the Respondent complied is not only asking for a legal conclusion, but asking a question that's been asked and answered.

JUDGE JENSON: Wait a minute. He's expressed an opinion as to whether he has complied or not, now I'll permit it. Go ahead. I don't know what value it's going to be but let's find out. Overruled.

A. Will you repeat the question, please?

Q. The question is, during those depositions in which you participated, did the Respondents in this matter comply with the Judge's Order as it appears in pages 19 and 20 of the transcript?

A. I'll preface that by saying that the Order of Judge Rudell's [sic] is unclear now as it was the first time I read it, and I'm not sure exactly what she was saying. Both Mr. Katz and Miss Splain did generally proceed [sic] any questions relating to what I considered material relevant to the 883 case by indicating that it wasn't their intention to get into the NLRB proceedings or any statements given. However, in my opinion, the questions which were asked thereafter did just that. And, the best way I can answer your question about Judge Rudell's [sic] Order is as I read the Order the questions did go into matters which were subject of testimony at the NLRB and I think I made that comment prior to answers to questions having been given.

Q. Well, Judge Rudell's [sic] Order states that on page 20 line

2, they may not inquire as to what statements were made to NLRB investigators. Did the restaurant's counsel in depositions ask about what statement were made to the NLRB investigators?

A. No, but they both counsel did ask questions after I indicated that certain statements had been made to the NLRB investigators, I believe. That's my recollection. And, I might point out, I guess these aren't a matter of record, but the it's my opinion that both parties made very special efforts to put on the record, during the depositions their positions concerning the applicability of Judge Rudell's [sic] Order to certain questions.

[Pages 61–63]

THEREUPON,

MRYLAND [sic] R. HELTON

was called as a witness by and on behalf of the General Counsel and after having been sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Your name and home address please.

THE WITNESS: Mryland [sic] Ruth Helton, 1634 West Andorra Drive, Phoenix.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Mrs. Helton, do you have any nicknames?

A. Yes, by [sic] nickname is "Bird".

JUDGE JENSON: You're going to have to talk louder.

BY MR. PETTIBONE:

Q. Would you spell that please?

A. B-I-R-D.

Q. Do you ever go by anything else?

A. I go by Ruth also.

Q. May I call you Ruth?

A. Sure.

* * * * *

[By Mr. Pettibone, Attorney for Board]

Q. Were you ever employed by Bill Johnson's Restaurants?

[By Ruth Helton]

A. Yes, I was.

Q. Where?

A. At 3757 East Van Buren.

Q. Is that in Phoenix?

A. Yes.

Q. And, when were you first employed there?

A. I think it was the second month, the second day of '72, I think.

Q. And until when were you employed there?

A. Until the 8th of August, 1978.

Q. Why was August 8, 1978 your last day?

A. I was fired.

[Pages 92–101]

Q.[By Mr. Pettibone, Attorney for Board] Calling your attention to September 20th of this year, what did you do that day?

A.[By Ruth Helton] We picketed the Big Apple.

Q. All right. Who was we?

A. Me, and Dale Michaud and Cheryl Nichols and Carl Nichols was there and Carla Marie Scott — guess Johnny Helton was there for about fifteen (15) minutes.

Q. Okay, and you said the Big Apple, where?

A. The Big Apple Restaurant on 3757 East Van Buren.

Q. Had you picketed the restaurant before?

A. No, we hadn't.

Q. Had you picketed any of the other Bill Johnsons restaurants before?

A. No.

Q. Did you picket on other days?

A. Yes, we did.

Q. What did the sign say that you carried on any of the days you picketed? Or that any of the picketers carried that you can recall?

A. It said, boycott the Big Apple, Big Apple Little Management, Big Apple rotten to its employees, Support your local waitress, Boycott Big Apple, Big Apple unfair to waitresses, Big Apple Prejudice, Unfair Labor Practice, it said the Big Apple has been accused unfair labor practice, Complaint Number and gave the Complaint number. And, it said, the union would work to the disadvantage of everyone concerned, signed the Johnson Family. Johnson Family antiunion.

Q. Do you know why that was on the sign?

A. Yes, because it's what they printed and — in a letter that they passed out to the employees after I was fired.

Q. How many different signs were there do you recall approximately?

A. There was five (5) and then we turned one of them over and made another one. But there was only five (5) at any one time.

Q. Did you have any conversations with any supervisors the first day of picketing?

A. Yes.

Q. With whom?

A. Sherry Sturgeon, and she's the day supervisor.

Q. And, where was that conversation?

A. It was on the sidewalk in front of the restaurant.

Q. You were picketing at the time?

A. Yes, we were.

Q. Okay, can you please tell us how that conversation arose?

A. We was — we had been there about fifteen (15) minutes after we arrived. I think it was around 9:00 or 9:15, it was about

the time that she came on. And, this truck had stopped just inside the driveway and it asked us what we was doing. We told him we was boycotting the Big Apple. And, he said he had been there earlier that day and hadn't saw us and we —

Q. Who's he — I'm sorry to interrupt, who's he?

A. — the customer.

Q. Is that the fellow in the truck?

A. Right.

Q. All right. Please continue.

A. Okay, and we told him if he wanted to talk, park his truck and come back and talk to us. And, before he had a chance to pull away, Sherry came out and said don't block my fuckin driveways and we said we're not blocking your driveways and she said, and get the fuck off my property. And, I said I'm not on your property, but if it will make you happy, you know, we've been walking across the driveways, not stopping and then walking back, and I said, if it will make you happy we'll stay right here in front and not cross the driveways. And, she said, you might think you're funny, but I intend to have the last laugh. And, she said, I will get even with you for what you're doing to us. And, I said, don't threaten us, Sherry. And then, she walked across and she had a paper and she said to Debby Makey, who the hell are you. And Debby said, I'm Debby Makey, I used to work here. And then she said to Dale, and who are you. And, Dale told her her name and she said, you're going to all pay for this. And, she said, and Debby, you and Dale as my witness, Ruth I'll get even with you if it's the last thing I do. And I do intend to have the last laugh. And, I just told her don't threaten us again. And, she started back across the parking lot. And, she stopped about half way across and looked back, and she said, is these your right names, I think is what she said. And, I said yeah, and there's some more coming down, do you want their names too. And, she said, no this will be enough. And, then she went on inside.

Q. Were you laughing at the time?

A. No, I wasn't laughing. I was scared.

Q. I'm sorry I didn't hear you?

A. I said, she scared me.

Q. Okay, you testified that you had been walking across the driveways, and you had been walking on the sidewalk. Does the sidewalk continue across that driveway?

A. Yes.

Q. How many driveways are there there?

A. Two (2).

Q. Okay, and when you walked across the driveway, did you walk across on the sidewalk or off the sidewalk?

A. On the sidewalk.

Q. On the days that you picketed the Bill Johnsons by the way did you picket other Bill Johnson's restaurants besides this one?

A. After, yes we did.

JUDGE JENSON: Let me ask one here. On the time that you picketed on September 18th that you related here, were you handbilling?

THE WITNESS: Well, I think first it was the 20th, no we didn't handbill.

BY MR. PETTIBONE:

Q. Okay, did you handbill?

A. Yeah, we did.

Q. When?

A. The 22nd.

Q. Is that the first time you handbilled?

A. Yes.

Q. And did you handbill on any occasions after that?

A. The 22nd and the next following Tuesday.

Q. Okay, and have there been any other occasions that you handbilled that you can recall?

A. Since — I'm not sure which day we had the hearing on the TRO, but we did two (2) days after that.

Q. About when, what month?

A. It was in November.

Q. And, you say the hearing of the TRO, is that when did you first find out about the TRO?

A. TRO?

Q. Yes.

A. I found out about it Monday, the 25th of September.

Q. And, when you say the hearing on the TRO, you're referring to that date?

A. No, I'm talking about after we went to Court on it, which was in November.

Q. Okay. Ruth, I'm going to show you Respondent's Exhibit No. 1 and ask you is that a copy of the handbill that you distributed?

A. Yes, it is.

Q. Thank you. You testified that you picketed on the 20th. Did you picket on the 21st? Of September?

A. Yes.

Q. How about the 22nd?

A. Yes.

Q. How about the 23rd?

A. No.

Q. How about the 24th?

A. No, not on the weekend.

Q. Okay, how about the 25th?

A. No, we didn't picket that day either.

Q. Why not?

A. We got sued that day.

Q. How did you find out about the sued?

A. Larry Katz called me at home. Okay, first Carla had called.

Q. Carla who?

A. Carla Marie Scott.

Q. Okay, about what time did she call you?

A. It was about — I think about ten till eleven.

Q. Okay, what time did Larry Katz call you?

A. I think it was about ten after eleven somewhere around there.

Q. Okay, why don't you tell us what he said to you. Excuse me, yes, on the phone. Go ahead.

A. Well, he said that there was going to be a hearing in Judge Rudell's [sic] Court and he gave me the courtroom and the number or whatever, and I think he asked me if I had a pen and was writing it down and I said, no wait a minute, I'll get one, and I got one.

Q. Did he say when that hearing was?

A. He said it was for 12:00 o'clock.

Q. What day?

A. That day.

Q. Please continue.

A. And, I think that's when I said, is that today, and he said, yes. And, I said something about what would happen if I couldn't make it, and he said, could I get a hold of my husband and could he make it. That he was a defendant in it too.

Q. Who said that?

A. Mr. Katz.

Q. Okay, please continue.

A. And then he said, did I want to know who the defendants were. And, I said, yeah, okay. So, he read them off the nine (9) defendants, Barbara Orr, Larry Orr and I guess — when he read off all of the defendants, I recognized them as being the ones that picketed but I didn't say anything and he said, anything else. And, I said you shouldn't be scaring those girls like that. And, he said, aren't you. And, —

Q. Was that in response to your statement that come right after in time?

A. Yeah.

Q. And, what was that again?

A. Aren't you.

Q. What else was said?

A. I said, no. And, he said, any more questions, and he said do you think you could get a hold of your husband and I said, yes, I think I can. And, he said thank you very much and he hung up.

Q. Okay, did you attend the hearing at 12:00 that day that he spoke of?

A. No, I didn't.

Q. Why not?

A. Cause I just got out of the shower. My hair was wet and it's like a forty-five (45) minute drive almost to downtown from where I live on 19th Avenue, and there was no way I could have made it.

Q. I assume then that the courthouse is downtown?

A. Pardon?

Q. I assume that the courthouse is downtown?

A. Yeah, the one that he gave me. I think it was on Jefferson or one of those streets.

MR. PETTIBONE: Your Honor, I would ask if the Respondent's counsel will stipulate that this is the Ruth Helton named in the civil complaint.

JUDGE JENSON: If this is the what?

MR. PETTIBONE: The Ruth Helton named in the civil complaint, and also it's the Ruth Helton named — whose deposition is included — well, it's not in evidence yet. If it is eventually in evidence, it is the same Ruth Helton whose deposition is included in General Counsel's 2.

MR. KATZ: Yeah.

JUDGE JENSON: All right fine. Is your deposition here in total or it is?

MR. PETTIBONE: It's the portions, Your Honor. Of (h). Your Honor, I have no further questions of Mrs. Helton at this time.

[Page 103]

CROSS EXAMINATION

BY MR. KATZ [Attorney for Restaurant]:

[Pages 131–38]

Q.[By Mr. Katz, Attorney for Restaurant] Okay. Let's go to September 20th now, which is of course, after you were terminated, September 20, 1978. On that day you began your picketing and your demonstrations in front of the restaurant, correct?

A.[By Ruth Helton] Correct.

Q. Do you remember how many of you were engaged in the picketing on that day, September 20th?

A. What do you mean by engaged in the picketing? How many was there?

Q. How many were in the demonstration? How many of you participated?

A. There was me and Carla Marie Scott, and Dale Michaud, and Debby Makey and Cheyrl Nichols and Carl Nichols, and John Helton.

Q. For some period of time, at least, you were crossing the restaurant's driveways, were you not, walking back and forth on the sidewalk?

A. Yes, we were.

Q. And, there was some period of time also, was there not, when you were talking to customers who were driving in and out of the driveways? You would talk to them as they drove in and out, is that correct?

A. We said, hi, you know.

Q. You testified that on one occasion there was a truck in the entrance way in the driveway, and you were talking to the driver when Sherry Sturgeon came out of the restaurant.

A. He wasn't actually in the entrance way. He was over to the side of the entrance way.

Q. Well, was he in the driveway to the parking lot?

A. Yes.

Q. And, you were talking to him while he was in that driveway?

A. One of us was. I'm not sure if it was me or Dale.

Q. Were you and Dale both standing next to the truck at that time?

A. We were standing at that end of the sidewalk but we wasn't standing next to the truck.

Q. Anybody else besides you or Dale?

A. Debby was there, but I think she was back up the other end.

Q. On any other occasion on September 20th did you talk to customers who were going in and out of the driveways?

A. As they went in and out, you mean talk to them by what we — you mean by talk to them we said hi to them. We told them to park the car, come over and talk to us and a couple of them did. We did talk to them as they went in and out.

Q. How many of you had signs?

A. Five (5).

Q. Did you observe any of the demonstrators waving those signs in any fashion in front of people who were driving out or in the driveway?

A. No, I didn't.

Q. Did you observe any of the demonstrators lowering their signs as people would come into the driveway?

A. Only if they asked to read it.

Q. Did that occur from time to time?

A. Every once in a while someone would say, what does it say, and they'd hold it down so they could read it.

Q. And, these might be people coming in the driveway, these people you're talking about.

A. Yeah.

Q. You also continued to do picketing on September 21st, correct?

A. Yes.

Q. You engaged in the same kind of activities you've just described that took place on the 20th?

A. Yes.

Q. Do you remember an incident on September 21st when one of the demonstrators yelled Uncle Tom to one of the persons coming out of the restaurant?

A. Yes.

Q. Could you describe that incident? What took place?

A. I was at the other end of the sidewalk. You want me to describe it from the beginning?

Q. From the beginning of that particular incident, yes.

A. A lady came up and said something to Carl and my husband and they said let me see the list you have, and as I started over that way, a lady said she didn't want to see any damn list and she went on into the restaurant. And, I said, what was that all about, and they said, she just said that she didn't think the Big Apple was prejudice. And, then a couple of minutes later, she came to the front door and she had her little black busboy and I understand her to say, does this look like prejudice to you. And, one of the girls yelled Uncle Tom.

Q. And, who was that who yelled Uncle Tom?

A. I think it was Cheryl Nichols.

Q. Was she one of the defendants subsequently in the lawsuit?

A. Yes, she was.

Q. On September 22nd, you also engaged in picketing right?

A. Yes, we did.

Q. And, on September 22nd you began distributing the leaflets that has been introduced as Respondent's Exhibit 1?

A. Yes.

Q. Do you know roughly how many of those leaflets you distributed?

A. I'm not sure. I think we took about a hundred (100). We may have passed out eighty (80) or ninety (90) I'm not sure.

Q. And, you distributed that leaflet on subsequent occasions, also?

A. Tuesday morning for an hour.

Q. Which was after the lawsuit was filed?

A. Yes, it was.

Q. And, in fact you distributed that leaflet again, just a few weeks ago, or several days ago?

A. Yes.

Q. The incident you described which — with Sherry Sturgeon according to your testimony she said among other things, I'll have the last laugh. You'll all pay for this, and so forth. Other than the demonstrators, was there anyone around who might have heard her make those statements?

A. No, there was only three (3) of us there at the time.

Q. Other than that one particular incident, did you ever speak to Sherry Sturgeon again during your demonstrations?

A. No, I didn't.

Q. Did any other representative of management or agent of management make any similar statements or quote, threats, unquote, to you? Similar to the one made by Sherry Sturgeon?

A. No.

Q. That was the only occasion on which it happened?

A. To me, yes.

Q. You testified that you got notification from me that a hearing was going to be held in Judge Rudell's [sic] Courtroom at about 12:00 o'clock on, I forget the day it was — November 5, I believe?

A. Correct.

Q. How —

MR. PETTIBONE: Objection, Your Honor. That's not what the testimony was. September 25th.

BY MR. KATZ:

Q. I'm sorry, September 25th. You received a telephone call from me telling you that the hearing was going to be held at 12:00 o'clock. You said before you received the phone call from me, you got a call from Carla Scott. Did she tell you that she had been notified? By me, about the lawsuit?

A. She said she had to go to Court, yes.

Q. Did she tell you she'd been notified by me?

A. Yes.

Q. And, did she say anything about the conversation I had with her?

A. Just that it was something about a TR something and she didn't really know what it was and she didn't really know what was going on.

Q. All right. But other than that, she didn't say anything about my conversation with her?

A. I don't think so.

Q. Okay. You did not appear at that hearing on the 25th did you?

A. No, I didn't.

Q. But your husband was there, was he not?

A. Yes, he was.

Q. Do you know who else was there?

MR. PETTIBONE: Objection, Your Honor. She wasn't there, how does she know?

MR. KATZ: Well, the witness has not said that she doesn't know. If she doesn't know, well, she can say that. But, I presume she's —

JUDGE JENSON: Well, he asked do you know who else was there, and then I suppose we'll find out how she know. Okay.

A. I know who they said was there.

Q. Did John tell you he was there?

A. Yes, he told me.

Q. And, did he tell you who else was there?

A. He told me that Carla Marie Scott and Debby Makey was there.

[Pages 215–16]

THEREUPON,

DALE MICHAUD

was called as a witness by and on behalf of the General Counsel, and after having been duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Give your name, spell your last name and give us your home address.

THE WITNESS: Dale Michaud, M-I-C-H-A-U-D 1816 North Staton Street.

JUDGE JENSON: All right off the record.

(Discussion off the record.)

JUDGE JENSON: Back on the record.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Dale, have you ever worked for Bill Johnsons Restaurants?

A. Yes.

Q. Where?

A. Down on Van Buren.

Q. Is that at 3757 East Van Buren?

A. Yes.

Q. Starting when?

A. I think it was in February of '78.

Q. Until when?

A. Till September of '78.

Q. Do you remember what day in September?

A. The 18th, I think.

Q. In what capacity did you work?

A. Waitress.

[Pages 227–230]

Q.[By Mr. Pettibone, Attorney for Board] Calling your attention to September 20th, of this year. What did you do that day?

A.[By Dale Michaud] Picketed.

Q. Who's we?

A. It was Debby Makey, Cheryl Nichols, Carla Scott, Ruth Helton and myself.

Q. Did all of those people that you mentioned picket in — at the same time during the day?

A. No.

Q. Where did you picket that day?

A. The Big Apple on Van Buren.

Q. Okay, and you had picketed a Bill Johnsons Restaurant before?

A. No.

Q. That day, did you have any conversations with any Bill Johnsons supervisor?

A. Yes.

Q. When was that?

A. It was about half hour after we were out there picketing.

Q. About what time of day is that?

A. 9:30.

Q. Which supervisor did you have a conversation with?

A. Sherry Johnson.

Q. And, who was picketing at that time?

A. There was Debby Makey, Ruth Helton and myself.

Q. Was anyone else present during that conversation?

A. Two (2) customers. We were talking to.

Q. Where were they?

A. They were in the driveway.

Q. Were they standing there?

A. No, they had a truck. They were parked in the driveway.

Q. Can you tell us what was said in that conversation?

A. Well, we were talking to the customers and Sherry came up behind us and told us that we weren't supposed to be blocking her driveway, so we turned around and walked away. And, then she followed us and she says, —

Q. Go ahead tell us exactly what she said.

A. She said, what the fuck are you guys doing. So, we didn't say nothing to her and she says, you fuckin guys think you're funny. And, she looked at Ruth and she told Ruth that she was going to pay for what she was doing to her, what Ruth was doing to them and I told her, I said, well, Sherry you don't have to swear at us. And, she looked at Debby because she thought Debby Makey had said that, and she said, who the hell are you. And, Debby told her and she said — she pointed at Debby and I and she said, you two are my witnesses for what's going to happen. Then she said she'd get the last laugh.

Q. Who'd she say that to?

A. To all of us, I guess.

Q. Did she say what was going to happen?

A. No, she didn't.

Q. What happened after that?

A. She turned around and walked away, and then she gave us the finger and walked inside the building.

Q. When you say gave us the finger, what do you mean? You don't have to show us, but what do you mean?

A. Well, she put her middle finger up.

Q. Okay, and where was she at the time?

A. She was in the middle of the parking lot.

MR. PETTIBONE: Will you stipulate that this Dale Michaud is the Dale Michaud named in the civil complaint and whose deposition was also taken in that case?

MR. KATZ: We will stipulate.

BY MR. PETTIBONE:

Q. Have you seen the civil complaint filed against you and other defendants?

A. Yes.

q. By Bill Johnsons Restaurants?

A. Yes.

Q. When you saw that complaint for the first time, did you have a reaction to it?

A. Yes.

Q. What was your reaction?

A. I was really scared and I didn't really know what was going on. And, I just thought I'd go to jail or something.

[Pages 239–40]

Q.[By Mr. Katz, Attorney for Restaurant] Were you aware that the handbill, Respondent's Exhibit 1 which I am now showing you, which the Judge is giving you a copy of, were you aware that this was going to be distributed on September 22nd?

A.[By Dale Michaud] Well, Ruth had called me on the phone and she told me the things we had marked down and I agreed to them, like you know when they were going to be distributed.

Q. Had you ever been the object of unwarranted sexual advances?

A. No, but I had heard.

Q. The question was whether you have ever been the object?

A. No.

Q. All right, and did you tell Ruth that?

A. Yes.

[Pages 247–48]

CHERYL NICHOLS

was called as a witness by and on behalf of the General Counsel and after having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Your name?

THE WITNESS: Cheryl Nichols.

JUDGE JENSON: And, spell your name for us.

THE WITNESS: C-H-E-R-Y-L, N-I-C-H-O-L-S.

JUDGE JENSON: And, your home address, please.

THE WITNESS: 15601 North 19th Avenue.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Cheryl, have you ever worked for Bill Johnsons restaurants?

A. Yes, I have.

Q. Where?

A. On East Van Buren.

Q. That's 3757 East Van Buren?

A. Yes, it is.

Q. In what capacity did you work there?

A. I was a waitress.

[Page[illegible]59–60]

Q.[By Mr. Pettibone, Attorney for F[illegible]rd] Calling your attention to September 20th of this year, wha[illegible]id you do that day?

A.[By Cheryl Nichols] I picketed the restaurant.

Q. What restaurant?

A. On East Van Buren.

Q. Bill Johnsons restaurant?

A. Yes.

Q. The one you used to work?

A. Right.

Q. Did you picket alone?

A. No, I did not.

Q. Who did you picket with?

A. Carla Scott, Dale Michaud, Ruth Helton, Debby Makey and my husband, Carl.

Q. Were you there all day?

A. I was there — I believe I arrived at around 11:00 o'clock.

Q. Had you picketed a Bill Johnsons restaurant before?

A. No.

Q. Did you picket other days?

A. Yes, I did.

MR. PETTIBONE: Will you stipulate that this Cheryl Nichols is the Cheryl Nichols named as the defendant in the lawsuit?

MR. KATZ: This is the Cheryl Nichols.

MR. PETTIBONE: All right.

[Pages 299–304]

CARL NICHOLS

was called as a witness by and on behalf of the General Counsel and after having been first duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Give us your name, spell your name and your home address, please.

THE WITNESS: My name is Carl Nichols, N-I-C-H-O-L-S. I live at 15601 North 19th Avenue, Space Number 164. That's Phoenix, Arizona.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Carl, are you related to Cheryl Nichols?

A. Yes, sir. I am her husband.

Q. And, calling your attention to September 20th of this year, what did you do that day?

A. I was involved in a picket in front of Bill Johnsons Restaurant on East Van Buren.

Q. Is that at 3757 East Van Buren?

A. Yes.

Q. Were you alone?

A. No, I was not.

JUDGE JENSON: Are you an employee or have you been an employee of the — Big Apple, is that what it is?

THE WITNESS: No, sir.

BY MR. PETTIBONE:

Q. Who else was with you when you were picketing?

A. Ruth Helton, my wife, Cheryl, Dale Michaud, Debby Makey and Carla Scott.

Q. Did you and Cheyrl [sic] arrive there together that day?

A. Yes, we did.

Q. Had you picketed a Bill Johnsons restaurant before?

A. No, sir.

Q. Did you picket any Bill Johnsons restaurant on any subsequent occasions? That is later occasions?

A. Yes, sir.

Q. Do you know some of the Bill Johnson supervisors?

A. Yes, sir. I do.

Q. Have you had any conversations with any Bill Johnson

supervisor, excuse me, on that day did you have any conversations with any Bill Johnson supervisor about the picketing?

A. Yes, sir, I did.

Q. With whom did you have the conversation?

A. With Jean Johnson.

Q. When?

A. It was approximately 3:30 in the afternoon.

Q. Where were you?

A. I was in the living room of my house.

Q. And, how did she happen to talk to you. That is was she there?

A. No, she talked to me over the telephone.

Q. Who called who?

A. Jean called me.

Q. Okay, would you please relate to us that conversation?

A. Sure. My wife Cheryl answered the phone. She handed it to me and said there is a lady that would like to talk to you. And, I asked her who it was, and she said, she didn't know. I answered the phone and the voice identified themselves as Jean Johnson. And, she asked how I was doing. I said fine. And, she said, why were we out in front of her restaurant that day. And, I said because of Ruth's firing and the girls felt that they weren't being treated fairly. And, —

Q. Do you recall anything else in that conversation?

A. Yes, she said I've always been fair to all of my girls.

Q. Okay, what was said after that if you recall?

A. I said I don't believe it's you that they're upset with. And, she said, who are they upset with, then. And, I said with Johnny Johnson and some of the other managers. And, she asked why. And, I told her because of the way Johnny conducted the July 25th meeting of 1978. And, I then told her that he told the girls that if he didn't like the earings they wore that he could fire them. And, that he referred to them as peons.

Q. In telling this to Jean Johnson, did you say when Johnny Johnson supposedly made this remark?

A. I'm sorry, could you repeat the question?

Q. Yes. In telling that to Jean Johnson, in telling her what Johnny Johnson had said, did you tell her when he supposedly made that remark?

A. Yes, I told her it was at the meeting on July 25th.

Q. Do you recall anything else said in that conversation?

A. Yes, we — she said that she would hate to see us lose that new home we bought, on one occasion. She said that she would sure hate to see — excuse me. She said that she would hate to see us get hurt by all of this. She said that twice during the conversation. She also said that she was going to take over management of the restaurant.

Q. Did she mention your wife in that conversation?

A. Yes, I believe she did.

Q. Do you recall in what context your wife's name was mentioned?

A. I believe she said that she felt she was a very sweet girl.

Q. Did she mention Ruth Helton in that conversation?

A. Yes, she did.

MR. KATZ: Your Honor, I think that the last several questions have been leading questions. I think that general Counsel should ask what was said in the conversation by whom to whom and not lead the witness down every subject that was in the conversation or not in.

MR. PETTIBONE: Your Honor, I asked a number of that type of question, what was said and I think I've adequately exhausted the witness's recollection on that.

JUDGE JENSON: Overruled, go ahead.

BY MR. PETTIBONE:

Q. What was said about Ruth Helton?

A. She said that Ruth had nothing to worry about. That her husband could support her.

JUDGE JENSON: Well, how did the subject of Ruth come up?

THE WITNESS: When she said that she would — I believe when she said that she would hate to see us get hurt by all of this.

JUDGE JENSON: Go ahead.

BY MR. PETTIBONE:

Q. Do you recall anything else during that conversation?

A. Not at the present time, no.

Q. Do you recall what preceded the remark about your house?

A. No, I do not.

Q. Can you tell us if that was in the beginning or the end of the conversation or the middle?

A. It was in the middle of the conversation, as I remember.

MR. PETTIBONE: Will you stipulate that this Carl Nichols is the same Carl Nichols in the civil suit as named defendant whose deposition was also taken?

MR. KATZ: Yes, I will.

MR. PETTIBONE: Okay, that's very kind of you.

[Pages 306–09]

Q.[By Mr. Katz, Attorney for Restaurant] Was the conversation cordial?

A.[By Carl Nichols] Yes, it was.

Q. Pleasant and friendly?

A. She seemed slightly upset when she was first talking to me but as the conversation went on she seemed to be calming down a little bit.

* * * * *

Q. From the whole tone of the conversation did you get the idea that she was trying to smooth over things and hopefully get

any kind of demonstrations or whatever to diminish against the restaurant?

A. Yes.

Q. Did she express concern for how the situation might effect you and Cheryl?

A. No, except for the fact that she said she would hate to see us get hurt, by all of this.

Q. Did you understand that concern as expressed in that statement to be genuine concern?

A. I'm not sure how she meant it.

Q. How did you think she did?

A. I had mixed feelings about it.

Q. Well, I mean did you go on and say, oh, sure common [sic], you don't mean that, you're just trying to get us. Or, did the conversation proceed in an more pleasant fashion?

A. The conversation proceeded, yes, in a pleasant fashion.

[Pages 317–18]

THEREUPON,

CARLA SCOTT

was called as a witness by and on behalf of the General Counsel, and after having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Your name, spell your name for us and your home address, please.

THE WITNESS: My name is Carla Scott, C-A-R-L-A S-C-O-T-T. My address is 1050 North 46th Street, D43.

JUDGE JENSON: Keep your voice up, Miss Scott so we can all hear you.

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Carla, have you ever worked for Bill Johnson's Restaurants, Inc.?

A. Yes, I have.

Q. Where?

A. It was on the east side, on Van Buren.

Q. Is that at 3757 East Van Buren?

A. Yes, it is.

Q. When did you first start working there?

A. It was in August of '77.

Q. And, when did you last work there?

A. September of '78.

Q. Do you recall what day in September?

A. The 18th.

Q. In what capacity did you work there?

A. As a waitress.

[Pages 328–30]

Q.[By Mr. Pettibone, Attorney for Board] Calling your attention to September 20th of this year, what did you do on that day?

A.[By Carla Scott] We started boycotting the Big Apple Restaurant.

Q. When you say boycotting what do you mean? What did you do?

A. We carried signs on the sidewalk there.

Q. Okay, the sidewalk where?

A. In front of Bill Johnsons.

Q. The same one we've been talking about?

A. Right.

Q. Okay, and who is we?

A. Debby Makey, Cheryl Nichols, Cheryl did not come until later, Dale Michaud, Ruth Helton and I.

Q. About what time of day did you start to, as you say, boycott the Big Apple?

A. We started at 8:00 o'clock.

Q. And, at the time — well, strike that. Had you ever picketed a Bill Johnson's Restaurant before?

A. No.

Q. Were you — did you stay at that restaurant during the entire time other people were there as far as you know?

A. Yes. Except for one time I left for about an hour.

Q. Okay, do you recall when you left?

A. I believe it was around 9:00 o'clock.

Q. Did you picket any Bill Johnson's restaurants prior to this day?

A. No.

Q. And, have you picketed any Bill Johnson's restaurants after that day?

A. Yes.

Q. Did you do anything besides picket on any of those days?

A. We handed out handbills.

Q. Okay, do you recall approximately how many times you did that?

A. I believe it was two (2) times, two (2) or three (3) times.

[Pages 338–40]

Q.[By Mr. Katz, Attorney for Restaurant] Do you remember when the lawsuit was filed in State Court by the restaurant against those who demonstrated?

A.[By Carla Scott] Yes. I don't remember what day it was, no.

Q. Do you recall being notified?

A. Yes.

Q. Being notified before the first hearing in that lawsuit that it was going to be a hearing?

A. Yes.

Q. Do you remember who notified you?

A. You did, I believe.

Q. By me, you mean Larry Katz, attorney for the Respondent, right?

A. Right.

Q. And, was there anything particular about that conversation that stays in your mind?

A. Just that I was to be at court at 12:00 o'clock for the hearing or what —

Q. Was I courteous and polite during the conversation?

A. Yes.

Q. Was there any indication in the conversation that I was trying to frighten you or anything like that?

A. Not really.

Q. Okay. Did you then call Ruth Helton after that conversation with me?

A. Yes.

Q. And, you told her what had happened?

A. Yes.

Q. Did you appear at that hearing?

A. Yes.

Q. And, did you testify at that hearing?

A. Yes.

Q. And, that was the only period in which Judge Rudell [sic] was deciding whether or not she was going to grant a Temporary Restraining Order against certain aspects of the conduct of the demonstrators, right?

A. Right.

Q. And, who else was at that hearing for the defendants?

A. Debby Makey, and John Helton.

Q. John Helton is Ruth Helton's husband?

A. Right.

A. And, did they all testify?

A. Yes.

Q. And, in fact a Temporary Restraining Order was issued by the Judge after that, was it not?

A. Yes.

[Pages 663–64]

LOIS WILLIAMS

was called as a witness by and on behalf of the Respondent and having been duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Be seated, and state your name, please?

THE WITNESS: Lois Williams.

JUDGE JENSON: Your home address, please?

THE WITNESS: 2825 East Cara.

JUDGE JENSON: Go ahead.

DIRECT EXAMINATION

BY MR. KATZ:

Q. Miss Williams, are you now or have you been related to Rudy Johnson, one of the owners of the Big Apple Restaurant?

A. Yes, I was.

Q. And, what was the relationship?

A. I was his wife.

Q. Now, we've used the names Lois Johnson and Lois Williams interchangeably in this hearing in the past. We'll refer to you as Lois Williams? Okay?

A. Okay.

Q. Are you currently employed?

A. Yes, I am.

Q. And, by whom are you employed?

A. Bill Johnson's Restaurants.

Q. Howlong have you been working for the restaurant now?

A. Approximately ten (10) years.

Q. Are you in a supervisory or managerial capacity?

A. Yes, I am.

[Pages 679–84]

Q.[By Mr. Katz, Attorney for Restaurant] Do you remember when the picketing began in front of the Big Apple Restaurant?

A.[By Lois Williams] I believe it was approximately September 20th.

Q. 1978?

A. Yes, sir.

Q. And, did you observe the picketing?

A. Yes, I did.

Q. Would you tell us what you observed on September 20th with regard to the picketing and demonstrations?

A. I observed the girls walking in front, tipping their signs in front of cars. Cars had to stop because they couldn't — they had to stop in order to read the signs and they would move the signs. I observed them going into the driveway to discuss — to talk to people in cars. I observed a delivery truck that had to stop because a car was stopped in front of it.

Q. All right, now let me ask you to be a little more specific about the whos and the whens and so forth. Who did you see participating in the picketing and the demonstrating on September 20th?

A. Ruth Helton, Carla Scott, Debra Mackay, Dale Michaud and Cheryl Nichols arrived later.

Q. All right. Was there any males involved in the picketing?

A. Yes, sir. Carl Nichols and for a brief time, John Helton.

Q. Now, you described the picketers dipping their signs in front of cars coming into the driveway. Who did you observe doing that and on how many occasions? On September 20th?

A. I observed Ruth doing it, probably —

Q. Who?

A. Ruth.

Q. Ruth Helton.

A. Ruth Helton doing it twice and probably Carla doing it twice.

Q. You described a delivery truck that had to stop before it go into the driveway, could you be a little more specific about that incident? What caused the truck to stop and what you observed?

A. There was a car stopped in the west driveway. I don't remember what type of a delivery truck. I believe it was linen, but the car was stopped in the driveway. There wasn't any way for the delivery truck to get around the car. They were talking to the driver of the vehicle and the delivery truck could not get into the driveway, until they were through talking and the car moved.

Q. About how long did that take?

A. Oh, maybe two (2) or three (3) minutes.

Q. All right. Based on your personal knowledge, would you describe the traffic and the pedistrian situation that customarily exists in front of your restaurant on Van Buren?

A. Well, it's very heavy.

Q. It's very heavy with what?

A. Traffic and pedistrian.

Q. Why is it heavy with pedistrian traffic there? Does it have something to do with the area? Would you describe the area?

A. Yes, we are right next door to the Ramada Inn. The Ramada Inn Executive Offices are across the street, which constitute a lot of foot traffic. It — the restaurant is set between numerous motels. There's a Ramada Inn on one side. The Arizona Palms on the other. And, other smaller hotels along Van Buren. The tourists or even not tourists, a lot of people that work for us or have worked for us

in the past, lived in these places. Don't have vehicles and will walk along the sidewalk.

Q. You have two (2) driveways, leading to the restaurant, do you not?

A. Yes, sir.

Q. How much sidewalk space is there between the two (2) driveways, do you know approximately?

A. Sixty (60) feet.

Q. Sixty (60) feet worth. Are there any kind of greenery or shrubs along the side, the sidewalks?

A. Yes, there are. There's the Van Buren beautification plan they put in there are trees and shrubs between the edge of our property, the sidewalk and the street.

Q. Now, in coming and going from work, you drive in and out of those driveways, right?

A. Yes, I do.

Q. Do those shrubs and trees effect driver's ability to see the streets at all?

A. Yes, they do.

Q. Did it effect your ability did you observe that?

A. Yes, it does.

Q. In what way?

A. The manner in which the trees are placed forces you to — if you're leaving from the west driveway, you have to pull out alr ost into traffic to be able to see around the trees, which puts you just right on the edge of traffic to where you're blocking — actually you're blocking the sidewalk but enable [sic] to see. Also, on the other side, is the Ramada Inn that has a very large bogenvia [sic], I believe it is, and you have to pull out a little farther to see in the other direction.

Q. All right, now when you have driven in or out of those driveways, is your ability to see up and down the street effected at all by pedestrians on the sidewalk?

A. Yes, it is.

Q. In what way is it affected?

A. Well, it's obstructed if there's pedestrians you know, the little bit of leeway you have for the shrubbery then if a pedestrian is there also, then it is obstructed that much more.

Q. Now, you know a lawsuit was filed by the restaurant on or about September 25, 1978?

A. Yes, I do.

Q. Did you participate at all in the decision to file that lawsuit?

A. No, I did not.

MR. KATZ: That's all for me, Your Honor.

CROSS EXAMINATION

[Pages 690–92]

Q.[By Mr. Pettibone, Attorney for Board] We testified to having seen vehicles stopped in the driveway —

A.[By Lois Williams] Yes, sir.

Q. And the pickets talking to the occupants of vehicles.

A. Yes, sir.

Q. Such vehicles parked in the driveway. Did you see any of those vehicles actually stopped?

A. Yes, sir.

Q. How many?

A. Ah, four, approximately.

Q. And the occupants then talked with the pickets?

A. Yes, sir.

Q. At the time you were making your observations and were watching the pickets Rudo [sic] Johnson was watching the pickets as well, was he not?

A. Yes, sir.

Q. And he was out in front near the sidewalk watching the pickets, was he not?

A. Yes, sir.

Q. That was the entire time you were watching he was also watching, is that correct?

A. I believe so, except he was also watching during the lunch hour when I was busy inside the restaurant.

Q. You testified that the girls were out in front, walking in front. I assume you mean on the sidewalk.

A. Yes, sir.

Q. Could you tell if customers were reading the signs when the girls were dipping them?

A. Yes.

Q. I take it that the signs as they were being carried by the girls would have been higher than the roof of the vehicles unless they were dipped, is that true?

A. Yes, sir.

JUDGE JENSON: When you speak of dipping, you mean they were holding the sign up vertically and then they just lowered it vertically?

THE WITNESS: No, sir. They would — the cars would pull in the driveway. They would tip them towards the cars.

JUDGE JENSON: Towards the cars, or over the cars, or what?

THE WITNESS: On occasion towards the cars to where the drive would be — there would be no way that the driver could not read the sign. Occasionally they would put them down so low that the cars would have to stop.

BY MR. PETTIBONE:

Q. It's your testimony that those signs were placed on occasion in front of those cars?

A. Yes, sir.

Q. How many times?

A. Maybe two (2), thr-e (3) times.

Q. Who did it, who was the picket?

A. I believe Ruth Helton did it on one occasion with the delivery truck. That's why the delivery truck could not get in. That's why I specifically remember that incident.

Q. It wasn't in front of the delivery truck was it?

A. No, it was in front of a car that was in front of the delivery truck.

Q. All right, What other picket?

A. Cheryl Nichols, on the opposite end.

[Pages 702–03]

SHERRY STURGEON

was called as a witness by and on behalf of the Respondent and having been duly sworn on oath, was examined and testified as follows, to-wit:

JUDGE JENSON: Be seated. Your name, please and your home address.

THE WITNESS: Sherry Sturgeon, 8205 North Second Drive.

DIRECT EXAMINATION

BY MR. KATZ:

Q. Sherry, what is your current employment?

A. What is my employment?

Q. Yes.

A. I'm employed at Bill Johnson's Big Apple.

Q. In what capacity?

A. Manager.

Q. Are you a member of the Johnson family?

A. Yes, I am.

[Pages 712–16]

Q.[By Mr. Katz, Attorney for Restaurant] Do you remember when the picketing began in front of the Big Apple Restaurant eastside?

A.[By Sherry Sturgeon] It was September —

Q. There's a calendar there if you need help to refreshen your recollection.

A. It was September the 20th wasn't it.

Q. Is that when you believe it was?

A. Yeah.

Q. Did you observe the picketing going on?

A. Yeah.

Q. When was the first time you observed picketing?

A. Well, one of the waitresses were coming on duty and one of the girls drawed it to my attention. She said what is going on out front. And, I said I don't know, has there been an accident? And, so I got up and looked out the window and I noticed the three (3) girls with the signs.

Q. And, what did you do?

A. I came back and called Larry Katz.

Q. That's me.

A. Right.

Q. And, you and I talked on the phone about it?

A. Right.

Q. And, what did you do then? During or after our phone conversation with respect to the picketing?

A. I went out to read what the signs said and to find out who the three (3) girls were because I didn't recognize one of them.

Q. Why did you do that?

A. At your request.

Q. And, what did you observe when you went out there?

A. They had a car blocking the driveway.

Q. Can you be a little more specific about who the they was and what you saw?

A. Dale Michaud, Debby Mackay and Ruth Helton were all three (3) standing and there was a car stopped right in the middle of the driveway. And, they were talking to the man inside the car.

Q. And, what did you do?

A. I went over there and told them to get out of the driveway.

Q. Did you use profane language?

A. Yes, I did.

Q. Did you swear?

A. Yes, I did.

Q. What was your reaction when you saw them in the driveway talking to the truck driver?

A. Well, it made me mad because they had the driveway blocked and they had a sign that said we were unfair management.

Q. Was there a further exchange between yourself and the picketers at the same time?

A. Yes, we had a talk.

Q. Do you remember what was said by whom and to who?

A. Well, when they started walking away from the car, you know. I told them they could picket all they wanted to, just to say — don't block the driveway. They started moving out of the driveway in front of the building on the sidewalk. And, Ruth was holding that sign out, sort of waving it back and forth, like some horse in a parade grinning from ear to ear. And, it made me mad. And, I told her she thought she was so funny, we would see who would have the last laugh.

Q. Did you make any statement with regard to getting even with Ruth?

A. No.

Q. You don't remember that?

A. No.

Q. Did you talk to the picketers again on any subsequent days of picketing?

A. Not, that was the only day I talked to them.

Q. Did you see them picket later that day also? On the 20th.

A. Just that day.

Q. Did you see them picket on the 21st?

A. No.

Q. Did you see them picket on the 22nd of September?

A. No, the 20th was the only day I saw them.

Q. That was the only confrontation of any kind you had with the picketers?

A. Yes.

Q. Did you participate at all in the decision to file a lawsuit against the demonstrators on September 25th?

A. No.

Q. You didn't have any participation in that decision at all?

A. No.

[Pages 725–26]

RUDY JOHNSON

was called as a witness by and on behalf of the Respondent and having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Your name and home address please?

THE WITNESS: My name is Rudy Johnson, 6825 North 8th Avenue.

DIRECT EXAMINATION

BY MR. KATZ:

Q. Rudy, what is your position and responsibility with the Big Apple Restaurant?

A. I'm the Executive Vice President and in charge of the whole operation really.

Q. And, how big is your operation?

A. We employ a little over four hundred (400) employees.

Q. And, how many different restaurants?

A. Four (4).

Q. What kind of a clientelle do you get at these restaurants?

A. Mostly families, lot of tourists, lot of foot traffic, lot of locals, everybody in general. The restaurant is very successful.

Q. How many Johnson family members are there who participate in the management of the restaurants?

A. There's me, my brother, my two (2) sisters and my mother, and Don Kalfus is a shareholder.

Q. He's not a member of the Johnson family?

A. No.

Q. You and your brother Johnny and Don Kalfus are the only male members of the group in management?

A. That's right.

Q. As far as ownership and management?

A. Owner managers, yes.

[Pages 741–50]

Q.[By Mr. Katz, Attorney for Restaurant] Now, on September 20, 1978, did you observe persons picketing and demonstrating outside your premises on the east side?

A.[By Rudy Johnson] Yes, I did.

Q. How did you first become aware that such activity was going on?

A. My younger sister, Sherry, called me at home approximately 9:30 in the morning. I arrived shortly after 10:00, probably 10:15, 10:20.

Q. What did you observe when you arrived?

A. The people walking up in front of the restaurant with signs. You want the names of the people?

Q. Please.

A. Well, there was Ruth Helton, Dale Michaud, Debra Mackay, Carla Scott. Ruth's husband was there for a short period of time and I believe Cheryl's husband was there for a short period of time. I don't know exactly.

Q. How many of them were carrying signs?

A. There was about five (5) signs total, I think.

Q. Do you remember what any of the signs said?

A. Big Apple prejudiced, Big Apple rotten to its employees, Big Apple, small management, support your local waitresses, boycott, boycott this establishment, somthing [sic] along those lines.

Q. And, did you personally watch the picketers for any period of time on September 20th?

A. I watched them the whole time, after I got there until they left.

Q. And, what did you observe with respect to the picketing? What kind of conduct did you observe?

A. Well, I had called a policeman earlier in the morning to advise them of their rights.

Q. For the policeman to advise the picketers of their rights?

A. Yes, because my sister had told me she had a confrontation with them in the driveway earlier. And, from the time I watched them until 2:00 o'clock it was — they had their signs on about six (6) foot poles and they would stand at the edge of the driveways and the signs had things wrote on both sides of them. They would lower their signs down for a person to read the sign and they would flip it over so they could read both sides. Telling people to pull in the parking lot and come and talk to them. Other than that, they were just quite loud.

Q. Did you observe any impact on traffic?

A. Well, it was awfully hard to get in the driveway on different

occasions, yes. The cars would slow down to read the signs and if a car was right behind them, then the would stop in the street and wait for the person to be able to read the sign or have the exchange of words with the picketers, and then go on in. This happened through our lunch period and through our lunch period the parking lot fills up.

Q. Did you observe any picketing on September 21?

A. Yes, I did.

Q. What did you observe and who did you observe on that day?

A. Well, that day they started about 5:00 or 5:30 and they lasted until about 8:00.

JUDGE JENSON: A.m.?

THE WITNESS: This was in the evening.

BY MR. KATZ:

Q. Who did you see there?

A. Ruth Helton, John Helton, Cheryl Nichols, Carl Nichols, Carla Scott, I believe was there, Dale Michaud was not there. Debra Mackay was not there.

Q. Any children?

A. Yeah, there was a couple of small children.

Q. Do you know who they were?

A. I have heard that one of them was Ruth's son. I don't know that to be a fact, but that's what they told me.

Q. What kind of conduct did you observe during this demonstration?

A. Well, this was probably one of their loudest nights. They once again got to the edge of the parking lot — the edge of the driveway, were dipping their signs, were cheering when people would leave, a lot of cars came in and left, without going into the restaurant. One particular occasion, a woman walked out of the restaurant with one of my black busboys, and asked, so does this look like prejudice to you, and Cheryl Nichols yelled at her, Uncle Tom in a very loud voice.

Q. Where were you at the time?

A. At that particular time I was about ten (10) feet from the picketers sitting in my jeep. I had been sitting on a wagon earlier that's in front but it got a little chilly so I got in my jeep.

Q. During the conduct you've described, during your observations of this conduct on the 20th and 21st, did you say anything to the picketers and tell them to stop or anything like that?

A. No, sir, I did not. I had one word to say to the picketers and I asked them to take their drinks off the fence.

Q. Why didn't you tell them to stop what they were doing?

A. Because you had advised me of their rights. You told me they could picket. I didn't want to make the situation any worse that it already was.

Q. What happened on September 22, the next day?

A. Well, I wasn't there September 22nd, that was a Friday night I believe, that's when they passed out those leaflets.

Q. Now, you're referring to Respondent's Exhibit 1, which I will show you a copy of right now?

A. Yes, sir.

Q. And, that was the leaflet that they passed out on September 22nd?

A. Yes, sir.

Q. Did you get a copy of that on September 22?

A. Yes, sir, I did.

Q. How did you come into possession of it?

A. Well, Don Kalfus got a hold of it and I believe he brought it to my house.

Q. When was that?

A. The same night.

Q. What was your reaction to the leaflet?

A. My reaction to the leaflet was that it made me very mad. I called you on the phone.

Q. Before you get to that, let me ask you, what made you angry about the leaflet?

A. The unwarranted sexual advances. My brother Me, and Don are the only three (3) male owner managers. I take that as a personal attack upon me and Johnny and Don. A filthy restroom for women employees with no soap, paper towels or toilet tissue provided is a lie, that's the only way I can explain that one. And, this thing was put together and at the top of it it appeared to me that the National Labor Relations Board had issued a complaint against the Big Apple restaurant and so on and so forth, it's all typed in bold letters. It looked like the NLRB was condoning it or actually doing it themselves. That's the way I interpreted this thing.

Q. Did you receive or overhear any comments from customers in regard to the leaflets?

A. Through my managers, yes, I —

Q. Did persons in management report to you comments they received?

A. Yes.

Q. And, what was reported to you?

MR. PETTIBONE: Objection, Your Honor. That's heresay.

MR. KATZ: Well, it's also part of Mr. Johnson's business responsibilities to receive and act upon these comments.

JUDGE JENSON: Overruled.

A. Don Kalfus told me of one instance where some people had been handed this thing. They came inside the restaurant and was in the lobby, got to the front door, and made some remark, if you want me to repeat it, I will, and let's get the hell out of the place. And, they turned around and left. It was a party of four (4).

Q. All right, now you stated a few minutes ago that it appeared to you, looking at the leaflet that the National Labor Relations Board had something to do with it. Did you receive any comments or hear any comments from customers or anyone else on that subject?

A. Yes, I did. I had a couple of truck driving friends of mine that came up to me and asked me what was the National Labor

Relations Board getting on me about unwarranted sexual advances for.

Q. Who were the persons who said that to you?

A. Well, two (2) brothers that drive trucks between here and Albuquerque that stop at the restaurant quite frequently. Their names are Tom Edwards and I believe his brother's name is Bob.

Q. And, when did they say that to you?

A. I believe it was Saturday afternoon the day after, something like that.

Q. Now, you mentioned that you got — you earlier testified that you got in touch with your attorney after the leaflet was passed out, and that's myself, right.

A. Yeah, that's right.

Q. What was your reason for getting in touch with me?

A. I wanted to see if I couldn't get it stopped.

Q. How did you intend to instruct me to get it stopped?

A. Well, I felt as though the unwarranted sexual advances and filthy restroom and so on and so forth, was a liabless [sic] and I wanted something done about it. They were standing out there passing these out to men, women and children. They was giving them to people on bicycles.

Q. What did you instruct your attorney to do at that time?

A. After you and me talked it over, I instructed you to institute a lawsuit.

Q. Do you remember when you gave that instruction to your attorney?

A. I believe it was the next morning, wasn't it? Saturday morning.

Q. Whatever your recollection is?

A. I talked to you Friday night and then went that Saturday and worked that weekend on it.

Q. Now, General Counsel's Exhibit 2 is a collection of legal

papers, Tab No. B is listed as the Complaint. Do you recognize that as the Complaint that was filed in Court pursuant to your instructions?

A. Yes, sir.

Q. That's on September 25th, it was filed?

A. Yes, sir.

Q. That Complaint has a verification on page 9, is that your signature on the verification?

A. Yes, sir.

Q. Now, prior to the filing of this lawsuit did you review the Complaint and sign the verification?

A. I did.

Q. Refering you to page 8, of the Complaint, there is a list of kinds of relief requested for by you in this lawsuit. And, in one paragraph I'd like to direct your attention to is paragraph 5. Would you read paragraph 5 and tell us why you wanted that relief and what sort of relief you wanted?

A. I wanted them to quit passing out this pamphlet. That's the relief I wanted.

Q. Now, paragraph 5 states quote, publishing and this is part of what's sought to be restrained, publishing false and misleading statement concerning plaintiff's business officers, agents and employees, facilities or practices. Were you referring to the leaflet?

A. Yes, sir.

Q. Was there anything else you were referring to? Of just the leaflet?

A. Just the leaflet.

Q. And, the paragraph goes on to say, including but not limited to, allegations misrepresenting the nature or substance of the matter now pending before the National Labor Relations Board as Case Number 28-CA-4970. What did you refer to, what did you mean by allegations misrepresenting the nature or substance of the matter pending before the Board?

A. The way this thing was written.

Q. What was it about the way that thing was written?

A. Well, the top of it was all bold letters. And, it appeared to me that the National Labor Relations Board had condoned or was behind it.

[Pages 752–73]

CROSS EXAMINATION

BY MR. PETTIBONE [Attorney for Board]:

Q. Mr. Johnson, on September 20th when you arrived at the restaurant, when you first observed the pickets, who did you observe picketing at that time?

A. [By Rudy Johnson] Ruth, Debra Mackay, Dale Michaud, Cheryl Nichols came a little later, I think. And, I don't recall the other names.

Q. Well, were there others there at that time when you first saw the picketing?

A. Let me think for a moment. John Helton was there, for a short period of time.

Q. Was he there when you first saw the picket?

A. No.

Q. Okay, that's what I mean, when you first saw it. So, when you first saw it there was Ruth Helton, Dale Michaud, Debby Mackay, right?

A. No, I believe there was one other person there, but I can't remember their name.

Q. John Helton, while he was there, didn't carry a sign, did he?

A. No.

Q. And, he was only there for about fifteen (15) minutes wasn't he? That day?

A. That's right.

Q. And, when you first arrived the pickets were on the sidewalk were they not?

A. That's true.

Q. And, you observed the pickets starting about 10:15 in the morning?

A. That's roughly, yes.

Q. Until about what time?

A. Until they left.

Q. Which was about when?

A. 2:00.

Q. And, that first day, where were you when you were observing the pickets?

A. I was sitting on an old wagon about from me to you from the pickets.

Q. And, we're talking about ten (10), twelve (12) feet, Mr. Katz?

MR. KATZ: Uh-hmm (yes).

BY MR. PETTIBONE:

Q. And, you observed them the whole time they were picketing?

A. Yes, sir.

Q. Wouldn't you say that you were the principle [sic] observer of the pickets that day?

A. Yes, I was.

Q. And, while you watched, the pickets were never in the driveway were they?

A. Physically, no.

Q. Now, you testified to seeing some pickets tipping or dipping their signs. Is that correct?

A. That's correct.

Q. The ones you saw were, correct me if I'm wrong, why don't you tell me, who did you see?

A. Ruth, and Cheryl. The first day I believe, Ruth and Cheryl on each end of the driveway. I couldn't watch them all at once.

Q. You say you saw Ruth?

A. What's that.

Q. Are you sure you saw Ruth tipping her sign?

A. I'm going to say I can't say for sure. Ruth was on the edge of the driveway with the sign. I can't recall if I saw her dipping the sign or not.

Q. The dipping of the sign didn't impede access — anyone's access to the restaurant through the driveway, did it?

A. It slowed them down. It didn't stop them totally, if you asked me if it was a toll gate type thing, it was not.

Q. All right. The pickets never stopped any of the vehicles with their signs, right?

A. The cars stopped to read the signs.

Q. All right, but the pickets never stopped any of the vehicles with their signs, right?

A. No.

Q. Okay. Police officer you called, he didn't arrest anyone there that day, did he?

A. No, he did not.

Q. And, you didn't overhear any conversations among the pickets there that day, did you?

A. The first day?

Q. Yes, the first day.

A. No. They were talking amongst themselves but I couldn't hear it.

Q. Did you hear any of the conversations between the pickets and the customers?

A. The first day?

Q. The first day.

A. No, sir, I did not.

Q. There's been testimony in this proceeding about the — there being a number of pedestrians normally in the area of the

restaurant. On that day, do you recall about how many pedestrians — well, strike that. Did any pedestrians that day have to walk off the sidewalk to get around the pickets?

A. Yes, they did.

Q. Do you recall about how many?

A. Four (4), five (5), six (6) something like that. They would come onto the parking lot and go around the pickets.

Q. That's the entire time you watched that day?

A. Yes, sir.

JUDGE JENSON: Was that because they couldn't get by or just a matter of walking around them?

THE WITNESS: Well, I can't say for sure if it was because they couldn't get by, sir. They walked into the parking lot to avoid the pickets, if this is the right word to use.

BY MR. PETTIBONE:

Q. And, let's go to the 21st. I believe you testified that you observed the picketing from approximately 5:00 till 8:00 in the evening that day?

A. Yes, sir, roughly.

Q. And, you named a number of people who were there picketing. Did some of them have — were some of them without signs? That second day?

A. I don't believe the children were carrying signs.

Q. How about some of the others. Do you recall?

A. I don't recall who was or was not. It was the same signs they had had the day before.

Q. And, that day you were the only one observing those pickets, were you not? You were the only management official observing those pickets?

A. The second day. Different people would walk out and give me something to drink. A manager would walk out and give me something to drink.

Q. But other than that, you were the one who was observing the pickets that day?

A. Yes, sir.

Q. ANd, that second day, the 21st, pickets didn't deny any vehicle or anyone access to your driveways into the restaurant did they?

A. It was a repeat of the same thing that happened the first day.

Q. So, in other words, the answer is no, is that correct?

A. They did not stop any cars from getting in the driveway, no. Coming through the driveway.

Q. And, that second day, did you see pedestrians walk off the sidewalk to get around the pickets?

A. Yes, I did.

Q. About how many?

A. Once again, I'm guessing. I guess the last time this question was asked me, four (4) five (5) or six (6), seven (7) something like that, just people walking down the street.

Q. If I told you that at your deposition in this matter, you had testified three (3) or four (4)?

A. That could be right.

Q. And, that's again I assume you saw the the pedestrians simply walk around the pickets and it appeared they were trying to avoid the pickets?

A. Yes, sir.

Q. Okay, and that second day you heard Carla Scott, one of the pickets say to the girls they were on strike, didn't you?

A. That's true.

Q. I take it you heard no other conversations among the pickets that day?

A. Only when Cheryl Nichols yelled Uncle Tom at one of my customers.

Q. Yeah, but among the pickets, among the pickets you heard no other conversation that day, right?

A. No, sir, if you're talking about between them.

Q. That's right.

A. No.

Q. Okay. Your name isn't mentioned in that leaflet is it, that the pickets distributed?

A. What's that?

Q. Your name is not mentioned in the leaflet that the pickets distributed is it?

A. No, sir.

Q. The leaflet doesn't even mention managers of the restaurant, does it?

A. No, sir.

Q. The leaflet doesn't say who, if anyone made those unwarranted sexual advances, does it?

A. No, sir.

Q. As part of the decor of the restaurant, I mean the restaurant at 3757 East Van Buren, the restaurant during working hours keeps sawdust on the floor is that correct?

A. That's true.

Q. And, is that sawdust collected at the end of the day?

A. Every night it's picked up, yes.

Q. And, at that time — well, strike that. And, I assumed it's dumped out there in the morning as well, spread around the floor?

A. Yes, sir.

Q. And, those empty sawdust bags that the sawdust comes in are then stored in the women employees restroom during the day, are they not?

A. They are put in an abandoned shower in the women's restroom, yes.

Q. Okay.

A. Along with the brooms.

Q. Anything else with the brooms?

A. Brooms and sacks to my knowledge is all that's in there.

Q. Brooms and pails and things of that nature, are they included in there?

A. Sacks to my knowledge is all that's in there. I do know the brooms and the empty sawdust bags are kept in there.

Q. Okay, you — do you ever have occasion to go into that restroom?

A. Very seldom.

Q. Okay, can you give me an idea how often that is?

A. How often I go into the ladies' restroom?

Q. Yes.

A. Well, I've been in there — over a period of how long are you talking about?

Q. Say within the last month, how many times have you been in there?

A. Within the last month, I've been in there several times.

Q. Okay, and do you go in there during working hours? During the hours that the employees are working?

A. During this past month?

Q. Yes.

A. Yes, I have.

Q. Okay, how about in July of this year, did you go into it during that month?

A. No, I don't think I did.

Q. Okay, and how about from August 1st to August 8th, did you go in at that time?

A. From August 1st to August 8th. I don't believe I was, no.

Q. Okay, how about the rest of August? Of this year?

A. Yes. I think I went in there once, or twice.

Q. Once or twice and how about September from September 1st to the 25th?

MR. KATZ: Your Honor, I'd like to ask some direction or relevance to the questions. So far we've been asked about a number of specific periods of time that Mr. Johnson allegedly went into the females' restroom. I don't see how it's related to anything in the case, yet. With my confidence in Mr. Pettibone, I'm certain it would be soon, but I'd like to know soon so I can pay attention a little bit.

MR. PETTIBONE: Would you like me to respond to that?

JUDGE JENSON: Go ahead if you like.

MR. PETTIBONE: Well, the witness has testified that the claim in the handbill that the restroom was filthy was a lie. He has an occasion to go in there and I think it's quite relevant whether or not that's true.

MR. KATZ: Thank you.

MR. PETTIBONE: Your [sic] welcome.

BY MR. PETTIBONE:

Q. Okay, September 1st through the 25th.

A. September 1st through the 25th, I went in there after I saw the handbills so —

Q. But not before?

A. No.

Q. And, you first saw the handbill on the 22nd of September?

A. That's true.

Q. Your deposition was taken in connection with the lawsuit filed on the 25th, on or about November 13th, is that correct?

A. I'm sure it is if you say so.

Q. Well, do you recall that it was?

A. Yes, I recall that I had a deposition taken, yes.

Q. And, your testimony was under oath during the taking of that deposition?

A. Yes, sir.

Q. And, didn't you testify, I'm going to use your word now, didn't you testify at that deposition, that that women employees' restroom was at times, disorientated?

A. That's true.

Q. The truck driving friends of yours, Tom and Bob, when did they make the complaint about the a — handbill?

A. It was shortly after. Exactly when I couldn't tell you. They were just going through town. Stopped at the restaurant, saw one of the handbills, asked me about it, and left.

Q. This is shortly after the handbill was distributed initially you mean. You say shortly after.

A. Yes, these handbills turned up inside the restaurant, outside the restaurant.

Q. Was this prior to the filing of the lawsuit?

A. What's that?

Q. Did they voice their concern about the leaflet to you prior to the day you filed the lawsuit?

A. I don't remember exactly. It was shortly thereafter — shortly after they were passed out. The exact date. Let me look and see if I can find the exact date for you, if that's what you want. It was close to the 25th.

Q. Of September of this year?

A. Yeah, they were traveling through town like I said. It could have been the day after or the day before. I couldn't say for sure.

Q. At your deposition, didn't you testify that you received no comments from customers or potential customers about their impressions concerning the handbill?

A. I possibly had said that yes, but I thought of a lot of things since I made that deposition. I made that deposition after I worked all night.

Q. Let me show you the document which purports to be the transcript of your deposition of November 13th, and direct your attention to page 44, lines 19 through 22.

A. Yes, sir.

Q. Didn't you testify that you had received no complaints from customers or potential customers, about their impressions concerning the handbill?

A. Yes, sir.

Q. And, at that deposition, didn't you also testify that you received no reports from any customers that they understood that the handbill meant that the National Labor Relations Board had received or issued the charges listed on the handbill?

A. Run that by me again.

Q. Didn't you testify that you had received no reports from any customers that it was their understanding upon reading the handbill, that the National Labor Relations Board had received support or issued the charges listed on the handbill?

A. I guess I did. That was — these two (2) guys were just a passing conversation.

Q. You say, yes, you did. Did you or didn't you?

A. I don't know — let me — may I see the thing. You know, I don't understand what you're asking me really.

Q. I direct your attention to page 38, line 26 through page 39 line 8.

A. Now, what was it?

Q. Page 38 line 26, that's the last line on the page to page 39 line 8.

A. That's what I said.

Q. When you say, that's what you said, you mean you did testify at that deposition that you had not received reports from any customers that it was their understanding from the leaflet that the National Labor Relations Board had received support or issued charges listed on the document?

A. No, I did not.

Q. That's what you testified, you had not received such complaints?

A. Right.

Q. And, at that deposition, didn't you also testify that the only

customer complaints you received about the conduct of the pickets was this one customer who brought the black busboy outside?

A. Yes.

Q. Mr. Johnson, I direct your attention to the six (6) items noted with asterisks toward the bottom of the handbill. Let's look at that first one. Isn't it true that the waitresses at the restaurant never had specified breaks?

A. That's true. They have no specific breaks.

Q. And, isn't it also true that if a waitress stayed after her shift was over, so that she could collect the tip from a customer, who was still eating, he had started eating before her shift was over and continued to eat after her shift was over, that she would not be paid for the time she spent after her shift was over if she stayed to collect that tip?

A. If she chose to stay, yes.

Q. Yes, she would not be paid is that what you're saying?

A. Correct.

Q. Now, let's look at the third one. Isn't it true that waitresses were threatened with dismissal if they missed too much time over the Christmas holiday season in the past?

A. There is only one way I can answer that question, sir, and that's company policy. If anybody is sick, whether it's Christmas, 4th of July, January or February, or whatever, and they're sick too much, they must bring in a doctor's excuse.

Q. Well, let me ask you this. At your deposition, didn't you testify that you were sure that waitresses had been threatened with dismissal if they missed too much time over the Christmas holiday season?

A. I don't believe I said that. Christmas or otherwise is what I said, I believe.

Q. Sir, I'm going to hand you what purports to be your deposition of November 13th, and direct your attention to page 41, line 22, and page 42, line 2.

A. That's what I said.

Q. You testified that you were sure that waitresses had been told that they would be dismissed if they missed too much time over the Christmas holiday season, right?

A. Let me see that again.

MR. KATZ: I think it's a mischaracterization of his testimony. Why don't you read the whole question and answer into the record?

MR. PETTIBONE: Sure, I'll be glad to.

JUDGE JENSON: All right, then the two (2) of you stipulate that this is the deposition recites as follows with respect to a question and answer proposed and answered by this witness, is that right?

MR. KATZ: Yeah, I'll stipulate to that.

MR. PETTIBONE: That's right. Line 22, page 41.

MR. KATZ: Okay.

MR. PETTIBONE: Question: "The phrase under the third asterisk or beside the third asterisk says waitresses threatened with dismissal. Do you have any facts to support your belief of your statement that they were threatened with dismissal is untrue? Answer: If they came in sick or got sick too often, question mark. I'm sure that was said to them." I'm sorry — I'm sure that that was said to them, there's two thats in that.

MR. KATZ: Your Honor, given the introduction of that evidence, we'd like to stand on our right now to read paragraphs of that deposition that relate to and clarify that paragraph read by General Counsel. I would like to read the question and answer that comes before that. That is on page 41, I'm sorry it begins on page 40, line 25 and goes up to what was read by Mr. Pettibone. I think without reading those lines I'm referring to, the question and answer are not clear.

MR. PETTIBONE: You want to start on page 40, line 25 to where I read.

MR. KATZ: To what you read.

MR. PETTIBONE: Go ahead.

JUDGE JENSON: What did you say?

MR. PETTIBONE: I told him to go ahead. I'll stipulate that that can be received.

MR. KATZ: Line 25 on page 40 begins as follows: "Question, by Mr. Keenan, Let's move on to the second one, waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season. I think that the earlier deposition testimony was one of the complaints was the '76 to '77 holiday season. What facts do you have to believe that that statement is untrue and outrageous? Answer: Let me once again, go to company policy. If you miss time, whether it is Christmas or otherwise, if you miss too much time, you must bring a doctor's excuse if I request that. If you miss too much time then I tell you, suppose you were working there why don't you take time off until you get your problem straightened out. I have never fired anybody or do I think any of the managers has fired anybody for being legitimately sick at Christmas or otherwise. Question: Do you have any evidence to believe that the threat was not made? Answer: Repeat that last question?" end quote. Then it picks up with what Mr. Pettibone read you.

JUDGE JENSON: Do you so stipulate?

MR. PETTIBONE: Yes, Your Honor.

JUDGE JENSON: So stipulated.

BY MR. PETTIBONE:

Q. Mr. Johnson, with respect to the fourth item on the handbill, the fourth one marked with an asterisk, inconsistent management practices, isn't it true that have been inconsistent management practices with regard to substitutions on the menu over the past year?

A. Inconsistent is such a broad term, but yes. If somebody walks in the door and wants to buy a banana, one person might charge them a dime and the next person might not know what to charge them and charge them a quarter. If you call that inconsistent, yes.

Q. And, we're talking about the managers?

A. Sure.

JUDGE JENSON: Is that the only type of inconsistent management practice that you can think of?

THE WITNESS: Well, he asked me about substitutions.

MR. PETTIBONE: Your Honor, are you asking the witnesss to tell you all the inconsistent management practices he's ever seen at the restaurant?

JUDGE JENSON: Well, I'm under the impression from his question that that is the only inconsistent practice, and are there others, that's all. It just sort of left me up in the air was all.

MR. KATZ: I think it would be fair to say that with the large number of managers we've heard about from time to time, there's bound to be inconsistent management practices.

[Page 819]

CARLA SCOTT

was called as a witness by and on behalf of the General Counsel and having been duly sworn on oath was examined and testified as follows, to-wit:

JUDGE JENSON: Be seated and give us your name.

THE WITNESS: It's Carla Scott.

DIRECT EXAMINATION

* * * * *

[Pages 821–26]

Q.[By Mr. Pettibone, Attorney for Board] You have before you a copy of Respondent's Exhibit No. 1. Have you seen that document before?

A.[By Carla Scott] Yes.

Q. Have you read it before?

A. Yes.

Q. You'll note six (6) items toward the bottom with asterisks next to them. Do you believe those items to be true?

A. Yes.

Q. Do you have any reason to believe they are not true?

A. No.

Q. I want to talk about a couple of these items with you. There's one item there that says unwarranted sexual advances. Do you have any personal knowledge of what you would consider to be unwarranted sexual advances that occurred at the restaurant while you were employed there?

A. Yes.

Q. Okay, just one incident or more than one incident that you have personal knowledge of?

A. Well, it was with Don Kalfus.

Q. Is that one time or more than once?

A. It was more than once. He had asked me out a couple of times throughout the year when I was working there and then also when I was coming out of the lounge, he was going in and he hugged me and started to kiss me and I slipped underneath his arms and walked out the door.

Q. When did that happen?

A. It was during the summer time.

Q. Of which year?

A. Of '78.

Q. And, was anyone else present when that happened that you can recall?

A. Yes. There was Ruth and there was a couple of other waitresses I know, but I'm not sure exactly who they were.

Q. Are there any other incidents that you have personal knowledge of?

A. No.

Q. Okay, are there any incidents that you have heard of?

MR. KATZ: Objection, Your Honor. It calls for a heresay reply.

JUDGE JENSON: Yes or no?

A. Yes.

Q. And, who related these other incidents to you?

A. Some of the girls at the restaurant.

Q. Can you tell me which ones?

A. One of them was Mary Kay Mitchell.

MR. KATZ: Your Honor, I object to the continuation of the heresay testimony. If this is being offered for proof of the fact that unwarranted sexual advances occurred, it is heresay. If it being offered for proof of the fact that Carla Scott received such information, it's irrelevant.

MR. PETTIBONE: Your Honor, I am not offering the — this testimony to prove the truth of the facts asserted. That is that unwarranted sexual advances did occur, except for, of course, the ones where Carla Scott was personally involved. The — Mr. Rudy Johnson has testified the lawsuit was filed claiming that the handbill and this item in particular liabled [sic] the restaurant. The test under the Lymm [sic] standard, that is the Supreme Court standard which the Board accepts is whether or not the person who alleged, or persons who allege the allegedly liabless [sic] statement did so with known falsity or reckless disregard of the truth. This person in forming her belief that that element is true relied on what Respondent's counsel characterizes as heresay testimony, that is not heresay for purposes of showing whether or not she made her accusation in good faith.

JUDGE JENSON: Well, let me find out. Did you make this document up?

THE WITNESS: I did not make that, no.

JUDGE JENSON: Did you participate in making it up?

THE WITNESS: No.

BY MR. PETTIBONE:

Q. May I ask one question? Did you distribute this document while picketing?

A. Yes.

MR. KATZ: Your Honor, my response to what the General Counsel has said is that he is seeking to try the liable [sic] lawsuit under its merits.

JUDGE JENSON: Well, it seems to me —

MR. KATZ: If we go through this hearing and try and prove whether or not that was liabless [sic], we will be doing many, many hours of irrelevant work. It is not relevant to the issues before this Court.

JUDGE JENSON: This witness didn't make up this document. She didn't participate in making it up. I don't think she would be the one to testify with respect to any further to that item unless she had her own personal knowledge and I think it would be anyone else who had such advances made would be the appropriate one to testify. That's my view, so I'll sustain the objection.

BY MR. PETTIBONE:

Q. Carla, I direct your attention to the last item. The one that speaks about a filthy restroom for women employees. Do you have any personal knowledge about that item?

A. Oh, yes.

Q. Would you tell us what your personal knowledge is?

A. Well, you could go into the restroom and sometimes you would find no toilet paper, no paper towels, no soap, you know, and sometimes you'd have all three (3) but most of the time you had nothing and you'd had have to send someone out for napkins or something.

Q. Napkins to — why napkins?

A. To wipe your hands or —

Q. ANd, how often did this happen to you?

A. Quite often.

JUDGE JENSON: Well, wasn't there soap, paper towels or toilet tissue available?

THE WITNESS: I don't know, sometimes there were and sometimes there wasn't. I don't know.

JUDGE JENSON: Well, when it was, where was it kept? Do you know where it was kept?

THE WITNESS: No, I think it was kept in the back somewhere. I don't know.

JUDGE JENSON: Was this on one or more than one occasion?

THE WITNESS: This was more than one occasion.

JUDGE JENSON: Go ahead.

MR. PETTIBONE: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. KATZ:

[Pages 829–32]

Q[By Mr. Katz, Attorney for Restaurant]. Do you know who's responsibility it was to clean the restroom?

A[By Carla Scott]. No.

Q. Isn't it a fact that the waitresses shared that responsibility?

A. We swept it out, and swept the lounge out.

Q. Was that done on a daily basis?

A. It was supposed to be, yes.

Q. Did you ever participate in sweeping out the restroom?

A. Oh, yes. We each had a day that we were supposed to.

Q. And, if there wasn't toilet paper or towels at some time, that was a part of your responsibility to make sure they got put in?

A. Yes, but you'd tell the busboy or something to get them, and they never would.

Q. Would that be the limit of your responsibility of cleaning the restroom, telling the busboy?

A. Pardon.

Q. Would that be the limit of your responsibility with respect to cleaning the restroom and putting in the towels and toilet paper, just telling the busboy about it?

A. Yes.

Q. And, if he didn't do it, you didn't worry about it?

A. No.

Q. Are you married?

A. No.

Q. Were you married at the time Don Kalfus asked you out?

A. No.

Q. What did he ask you to do?

A. He just asked if I wanted to go out.

Q. You mean on a date?

A. Yes.

Q. Do you consider that to be an unwarranted sexual advance?

A. Yes, I do when he was married.

Q. Was he married at the time?

A. As far as I knew, yes.

Q. You don't know for sure?

A. From what I had been told, yes, he was married.

Q. What did he ask you to do? What kind of a date?

A. Just to go out.

Q. To what?

A. He never really said. He just all he said, was well, we should go out and have a good time and — that's all. And, I'd always laugh and walk away.

Q. He did it a lot, did you say? It happened often?

A. Yes.

Q. And, you'd laugh and walk away?

A. Yes.

Q. You never took him up on it?

A. No.

Q. Did you ever file any charges with the Equal Employment Opportunity Commission?

A. No.

Q. Did you feel your job was in some way effected by your refusal to go out with Don Kalfus?

A. No.

Q. The first time you had anything to do with this leaflet was when you passed it out on September 22nd, isn't that right?

A. That's right.

[Page 833]

THEREUPON

CHERYL NICHOLS

was called by and on behalf of the General Counsel and having been previously sworn on oath was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PETTIBONE:

[Pages 836–39]

Q.[By Mr. Pettibone, Attorney for Board] Directing your attention now to Respondent's Exhibit 1. Have you seen that before?

A.[By Cheryl Nichols] Yes, I have.

Q. And, have you read it before?

A. Yes, I have.

Q. And, directing your attention specifically to the six (6) items at the bottom of the page. The ones with asterisks.

A. Yes.

Q. Okay, do you have any personal knowledge of your own — well, first of all let me ask, do you believe that those statements are true?

A. Yes, I do.

Q. All six (6) of them?

A. Yes, I do.

Q. Do you have any personal knowledge of your own to support your belief with respect to the asterisk next to the three (3) words, unwarranted sexual advances?

A. Yes.

Q. Okay, would you tell us about that personal knowledge?

A. Well, from things I've heard from the girls.

Q. No, of your own personal knowledge?

A. Oh, shortly after I started working there I was approached by Johnny Johnson at the counter and he asked me if I went out on my old man, and I said no, and he said that's too bad.

Q. Okay, were you married at the time?

A. Yes, I was.

Q. Directing your attention — is that the only one that you were personally involved in?

A. Yes.

Q. And, were there others you heard about?

MR. KATZ: Objection. On the grounds of heresay.

JUDGE JENSON: Yes, or no?

THE WITNESS: Yes.

BY MR. PETTIBONE:

Q. And, did you hear about the others from other waitresses?

A. Yes.

MR. KATZ: Same objection.

JUDGE JENSON: At this point, overruled. If we go into the content, then there might be something.

BY MR. PETTIBONE:

Q. Directing your attention to that last item, on the handbill, the last one with the asterisk, a filthy restroom for women employees and so on. Do you have any personal knowledge with respect to that to support your belief that it's true.

A. Yes, I do.

Q. Okay, what knowledge do you have?

A. There were always empty sawdust bags in the restroom. You had to walk over those and — to be able to go to the bathroom or anything. There were rarely paper towels, toilet paper and soap in the restroom. It was always filled with brooms and rakes and shoes and sweaters and clothes.

JUDGE JENSON: Well, now were they in the restroom itself or were they in the shower room, the shower?

THE WITNESS: They were in the shower but at times they would be in the restroom.

BY MR. PETTIBONE:

Q. Could you describe for us the layout of this restroom and where this shower is in it if you can?

A. Okay, you go into the bathroom, there's like a little alcove where there was a coat — a place where you could hang your coats and right next to it between that and the wall there was a little shower stall. And, then directly across from it was the sink and the toilet.

Q. Okay, what was adjacent to the restroom?

A. The waitress lounge.

* * * * *

[Pages 844–47]

Q. [By Mr. Katz, Attorney for Restaurant]. You described what you called a sexual advance by Johnny Johnson. You said that occurred shortly after you came to work in the Big Apple. It occurred approximately August of 1977?

A. [By Cheryl Nichols] It could have.

Q. What's your best recollection? As to when it occurred?

A. Well, when I first started working at the Big Apple, I was working in the jail. So, it had to have been after I first started working there.

Q. What's your best recollection as to the month and year?

A. In '77.

Q. Do you have — your best recollection as to the month?

A. I could have been August.

Q. That was the only quote, sexual advance, unquote Johnny Johnson ever made at you, wasn't it?

A. Yes.

Q. And, is was the only quote, sexual advance, unquote that any person of management or in a supervisory position in the restaurant ever made at you, right?

A. Yes.

Q. That was the only one, August of 1977? And, you, when Johnny made what you considered an advance you said no, and he stopped, right?

A. Yes.

Q. And, it had no impact on your job whatsoever did it?

A. No, not that I know of.

Q. And, you never filed any charges with the Equal Employment Opportunity Commission, did you?

A. No.

Q. And, you never took any action whatsoever with respect to it, until what, over a year later when the leaflet was handed out, right?

A. Yes.

Q. Did you write the leaflet?

A. No.

Q. When did you first see the leaflet?

A. After it had been passed out.

Q. Okay.

JUDGE JENSON: Anything else?

MR. KATZ: No, no other questions.

MR. PETTIBONE: No questions, Your Honor.

JUDGE JENSON: Did you ever tell anyone about that incident?

THE WITNESS, Yes, I did.

JUDGE JENSON: When?

THE WITNESS: After it happened.

JUDGE JENSON: Right after or some time after?

THE WITNESS: That evening I told my husband.

JUDGE JENSON: Did you ever tell anyone that worked at the restaurant about it?

THE WITNESS: Yes.

JUDGE JENSON: Who?

THE WITNESS: A couple of the waitresses that worked there.

JUDGE JENSON: Do you remember who?

THE WITNESS: I think I told Carla Scott.

JUDGE JENSON: Anyone else that you can recall?

THE WITNESS: Not that I can recall.

JUDGE JENSON: Any more?

MR. KATZ: Not from me.

MR. PETTIBONE: Yeah, a couple, Your Honor.

REDIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Cheryl, prior to distribution of this handbill did you have any knowledge it was going to be distributed?

A. Yes.

Q. How did you acquire that knowledge?

A. Ruth told me.

Q. And, do you recall approximately when?

A. I believe, I don't know when exactly, no.

Q. Can you tell us in general what was said — well, where did she tell you first of all. Do you remember that?

A. I don't remember where she told me, no.

Q. Was it in person or over the phone, do you recall that?

A. I — no.

Q. Do you recall what was said?

A. She told me that they were going to pass out leaflets.

Q. Did she discuss or did she say what the leaflets were going to contain?

A. Not that I can remember.

[Pages 848–51]

DALE MICHAUD

was called as a witness by and on behalf of General Counsel and having been previously sworn on oath was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PETTIBONE:

* * * * *

Q. Directing your attention to Respondent's Exhibit 1, have you seen that before?

A. [By Dale Michaud] Yes.

Q. Have you read it before?

A. Yes.

Q. Directing your attention to the six (6) items toward the bottom of the page, with asterisks on them. Do you believe those statements to be true?

A. Yes.

Q. Do you have any reason to believe they're not true?

A. No.

MR. PETTIBONE: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. KATZ:

Q. Did you participate in the preparation of this leaflet?

A. I didn't help prepare it, but I knew, you know, what was going to be on it.

Q. Were you among those who distributed it?

A. No.

Q. And, you didn't write anything that was on here?

A. No.

Q. Did anybody ask you for your opinion about this before it was written?

A. Everything that was written on it was read to me and I went along with everything.

Q. Anybody ever make a unwarranted sexual advance on you at the restaurant?

A. No.

Q. Neither management — rather no management?

A. No.

Q. Did you tell the writers of this leaflet that?

A. Well, I told them I had heard a lot of stories —

Q. Answer my question. The question is, did you tell them that no one ever made a sexual advance at you in the restaurant?

A. Oh, yes.

Q. You did tell them that?

A. Yes.

* * * * *

[Pages 853–56]

REDIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Who did you discuss the leaflet with prior to its distribution?

A. [By Dale Michaud] I talked about it with Ruth.

Q. And did you in that discussion, did you discuss the sixth item on — the last item on the handbill, the restroom?

A. Yes.

Q. What facts or what personal knowledge did you have on that sixth item?

A. Well, everytime you went to the restroom either you were out of toilet paper or you were out of paper towels. There was never any soap in there. And, then the sawdust bags were just thrown in the shower along with the brooms and everything. It was just filthy. Bathroom, you know.

JUDGE JENSON: You mean it was filthy or just messy?

THE WITNESS: No, it was just messy, yes.

JUDGE JENSON: You know, filthy to me denotes dirt and perhaps unpleasant smelling materials and so on on the floor, was it like that? At any time?

THE WITNESS: Well, there was no garbage cans, and whenever there was paper towels, you have to put them in the sawdust bags, which most of the time is on the floor, you know was thrown on the floor instead of being put in the bag.

JUDGE JENSON: Is that what you mean by filthy, that there were paper towels on the floor?

THE WITNESS: Well, yes. You know it was messy and disorderly.

JUDGE JENSON: Well, was it swept out? Weren't the girls supposed to sweep it out?

THE WITNESS: Yes, it was swept once a day.

JUDGE JENSON: Go ahead.

BY MR. PETTIBONE:

Q. Was there ever sawdust on the floor?

A. It was brought in from, like when we came in from lunch, you know, it was brought in then.

Q. It was brought in the restroom. Was there ever any sawdust from those sawdust bags that was on the floor?

A. Yes.

JUDGE JENSON: Well, the sawdust bags, what were they used for to carry clean sawdust that was dumped on the floor, is that what they were?

THE WITNESS: Yes.

JUDGE JENSON: Then what happened after the sawdust — was the sawdust swept up every night, do you know?

THE WITNESS: I'm not really sure. I don't know.

JUDGE JENSON: Well, was that sawdust put into the lady's, into the women's restroom?

THE WITNESS: No.

JUDGE JENSON: The stuff that came off the floor wasn't?

THE WITNESS: No.

JUDGE JENSON: So any sawdust that was in the restroom was debris that had been left in the bags which had been used to put into the restaurant, is that right?

THE WITNESS: Yes.

JUDGE JENSON: So, it would have been clean sawdust, so to speak?

THE WITNESS: Yes.

JUDGE JENSON: All right.

MR. PETTIBONE: I have no further questions, Your Honor.

MR. KATZ: Nor I.

JUDGE JENSON: Who takes care of scrubbing the lavatory in the women's restroom?

THE WITNESS: I have no idea.

JUDGE JENSON: Well, was it kept scrubbed? Or not?

THE WITNESS: Sometimes it was clean and sometimes it wasn't.

[Page 857]

DIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Mr. Kalfus, what is your occupation?

A. I am in the restaurant business, employed by Bill Johnson's Restaurants.

Q. And, what position do you occupy there?

A. At this time, I am serving as a manager in all the Big Apple Restaurants and assisting in the accounting department.

[Pages 858–59]

Q. [By Mr. Pettibone, Attorney for Board]: You're aware that Bill Johnsons has brought a lawsuit against Ruth Helton and other pickets aren't you?

A.[By Don Kalfus] Yes.

Q. And, you were present on the 2nd of October of this year during Ruth Helton's deposition in connection with that lawsuit weren't you?

A. Yes, I was.

Q. And at that deposition you heard her testify did you not, that in 1972 Sandra Lambertus exited the Bill Johnson's kitchen at 3757 East Van Buren red faced and told Ruth Helton that she had just taken a cup of coffee to you and that you had held her and kissed her in front of the cooks?

* * * * *

BY MR. PETTIBONE:

Q. Do you recall that?

A. I recalled Ruth giving some testimony referring to an incident where I kissed Sandra in the kitchen, yes.

Q. Okay, and your deposition was taken in connection with the lawsuit on or about November 10th of this year, wasn't it?

A. Yes.

Q. And, you testified at that deposition regarding that incident, didn't you?

A. I did.

Q. And, with respect to that incident, you testified that you did indeed kiss Sandra Lambertus in the kitchen, correct?

A. Yes.

[Pages 865–69]

BY MR. PETTIBONE [Attorney for Board]:

Q. Didn't you also testify at that deposition that you thought you had put your arms around Ruth Helton and kissed her since 1972?

A.[By Don Kalfus] I don't recall ever kissing Ruth Helton.

Q. Didn't you testify in the deposition that you thought you had put your arms around Ruth Helton and kissed her, since 1972?

A. No, as I recall the way the questions was asked —

Q. Is your answer, yes or no?

MR. KATZ: Well, let him answer. He's trying to answer the question.

JUDGE JENSON: He said, no, and then he started to say he remembered how the question was.

A. As I recall, I was asked if I had ever put my arms around Ruth Helton. My answer to that is, it's possible I put my arm around Ruth Helton but not in the sense that the question was asked when

the deposition was taken or not in the sense that the question is asked now.

Q. Mr. Kalfus, do you recall testifying at that deposition that you didn't specifically recall ever kissing Ruth Helton on the neck or putting your arms around her but you supposed you had?

A. In seven and a half years, to put my arm around a girl in the sense of laying my arm around her waist to ask her something or tell her something, not in the sense that there was something derrogatory about that or to take advantage of her.

Q. How about kissing her on the neck?

A. I don't recall ever kissing Ruth Helton on the neck.

Q. Do you suppose you might have?

A. I would think no.

Q. Let me show you a document which purports to be your deposition taken on or about November 10, 1978, in connection with the lawsuit filed by Bill Johnson against Ruth Helton and certain other pickets. I direct your attention to page 62, line 6 to 8, would you please read that to yourself? Did that help refresh your recollection?

A. The question is asked in a compound question.

Q. Did that help refresh your recollection?

A. No. Will you let me answer the question?

Q. Go ahead.

A. The question reads in a compound question. Two questions. Have I ever kissed Ruth on the neck, and have I ever put my arm around Ruth. I suppose in seven and a half years there may have been a time I've put my arm — I don't specifically remember it. But, I can't deny it at the same time. Have I ever kissed Ruth Helton. I don't recall ever kissing Ruth Helton. I don't recall ever kissing Ruth.

Q. Didn't you testify during that deposition that although you don't recall whether you have kissed her on the neck or put your arms around her, you suppose you had?

* * * * *

Q. All right. Let me ask one more time. Didn't you testify during your deposition that although you didn't specifically recall ever kissing Ruth Helton on the neck or putting your arms around her, that you suppose you had?

A. If that's the way I worded my answer in the deposition, than yes, that's the way I answered, by — my frame of mind at the time was, no, I had not put — I hand't kissed her, but I suppose it's possible that I put my arm around her.

Q. All right, let me direct your attention again to page 62, lines 9 through — I'm sorry, lines 6 through 8. Isn't that the way you framed your answer? That you don't recall whether or not you kissed her on the neck or put your arms around her, but you supposed you had?

A. Based on the way the question's worded there, yes.

[Page 870]

RUTH HELTON

was called as a witness by and on behalf of the General Counsel and having been previously sworn on oath, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PETTIBONE:

[Pages 871–72]

Q.[By Mr. Pettibone, Attorney for Board] I'm going to hand you a document which has been marked for identification as General Counsel's 6. Have you ever seen that document before?

A.[By Ruth Helton] Yes, I have.

Q. When was the first time you saw that document?

A. I saw it hanging in the lounge on the Christmas of '76.

MR. KATZ: Christmas of what year?

THE WITNESS: '76.

BY MR. PETTIBONE:

Q. Where in the lounge was it?

A. It was stuck on the door right in front on the bathroom door.

Q. That's the lounge in the Big Apple on East Van Buren?

A. That's right.

Q. What does that document relate to?

A. It relates to the coming weekend that was the Christmas holiday season, and that we was not to call in sick over the holiday season.

[Pages 873–83]

Q.[By Mr. Pettibone, Attorney for Board] Let me show you Respondent's Exhibit 1. And ask you if you've seen that document before?

A.[By Ruth Helton] Yes.

Q. Do you have any connection with that document other than having seen it before?

A. I drafted most of it.

JUDGE JENSON: Off the record.

(Discussion off the record.)

JUDGE JENSON: On the record.

BY MR. PETTIBONE:

Q. You say you drafted most of it. Do you know who drafted the remainder of it?

A. We drafted it together.

Q. Who's we?

A. Lois Dirkson and myself.

JUDGE JENSON: Lois who?

THE WITNESS: Dirkson.

BY MR. PETTIBONE:

Q. Did you do this together at the same location?

A. No, we did it over the telephone.

Q. Who called who?

A. As I recall Lois called me to ask me how she was going to help us picket. She hadn't made it down and asked us how it went.

Q. Okay, who brought up discussion with respect to Respondent's Exhibit 1?

A. She asked me how did we explain some of the thing, you know, to the newsmen or whatever. And, I said, well, we're still kind of confused as to you know, one wants to say one thing and one wants to say the other. And, she said, well, why don't we sit down and write up a list of the girl's complaints that you've heard them complain about, and put them all down so that you could just hand out a leaflet.

Q. And, did you follow her advice?

A. Yeah.

Q. How did you go about actually preparing a leaflet? This Respondent's Exhibit 1?

A. I had talked to Virgina Classman and she said that we could hand out a leaflet and that we could say anything as long as it was truthful.

Q. Who is Virginia Classman?

A. She is the hotel, restaurants and bartenders union representative, here in Phoenix.

Q. Okay, and do you recall when about you had that conversation with her?

A. I had it on Thursday, September, no, I had it on Wednesday, September the 20th.

Q. And, when did you actually prepare Respondent's Exhibit 1?

A. When did I actually prepare the — we wrote it out on a pad, and then on Thursday I took it in and had it typed up.

Q. And, where did you take it in to have it typed up?

A. I took it down to the — on 1st Avenue to Virginia Classman's office.

JUDGE JENSON: Who helped you write it up?

THE WITNESS: Who helped me —

JUDGE JENSON: Write it up, you said —

THE WITNESS: Lois Dirkson helped me write the one portion and then George Classman, who's Virginia's husband actually sit down and put it in these words.

BY MR. PETTIBONE:

Q. Now, at the time you drew this up, did you believe everything in there to be true?

A. I knew it was true.

Q. Okay, let's go to the items with asterisks next to them. What personal knowledge do you have to believe that the first one is true? The eight (8) hour shifts with no breaks?

A. I had worked it for approximately five (5) years. The first two (2) years I was there we did have a specified break. And, then after that there was just no specified breaks at all.

Q. You did get breaks didn't you?

A. If it wasn't too busy we did.

Q. Okay, how about the second item. What knowledge did you have, personal knowledge, to support your belief that that was true?

A. Well, I had never been paid for overtime. I know that when we came in at 6:00, we was marked down at 2:00. If we stayed to 2:30 or 3:00 we was marked out at 2:00.

Q. And, there is those days where you stayed till 2:30, that's after your shift was over?

A. It was a half an hour after, you know, sometimes, quarter to 3:00, forty-five (45) minutes after my shift was over.

Q. And, how many hours would you have worked on those days, approximately?

A. Well, approximately eight (8) hours forty-five (45) minutes or eight (8) hours, right at nine (9) hours.

Q. What about the third item?

A. I had not only saw the sign that was —

Q. You're referring to General Counsel's Exhibit 6?

A. Yes, I had also saw one posted in the lounge on a holiday after that. And, I think it was the 4th of July weekend, but I couldn't recall what holiday it was.

Q. Okay, what about the fourth item, inconsistent management practices. What personal knowledge did you have to support your belief that that was true?

A. Well, it was constantly happening to me. While I was there.

Q. Well, tell us about the times that happened that you can recall?

MR. KATZ: Well, I don't think it's necessary, Your Honor. We concede in seven and a half years, there were probably some inconsistent management practices that Ruth Helton saw.

MR. PETTIBONE: Well, do you so stipulate?

MR. KATZ: Well, it's on the record. I just said it.

MR. PETTIBONE: All right.

JUDGE JENSON: Proceed.

BY MR. PETTIBONE:

Q. How about the next item, unwarranted sexual advances. What personal knowledge do you have to support your belief that that was true?

A. I had happened to me. I've seen it happen to other people.

Q. Okay, let's talk about the times it happened to you first. When was the first time it happened to you that you can recall?

A. I think it was in the — I'm sure it was when they had the flood in '74, I think it was. I'm not exatly sure.

Q. Okay, where did this occur?

MR. KATZ: Objection, Your Honor, on grounds of relevance. It was four (4) years before the leaflet was distributed.

MR. PETTIBONE: Your Honor, as I said before the —

JUDGE JENSON: Overruled.

BY MR. PETTIBONE:

Q. Do you recall where it occurred?

A. Yes, I was working the side room. I was working from 6:00 to 2:00 going back and night and working from 5:00 till 10:00 at night, and the side room, the offices was now where the customer's bathroom is, and that was where at that time, we had a timeclock. And, —

Q. Excuse me. That's in the offices where — what were the offices at that time?

A. What were the offices at that time.

Q. Please continue.

A. As I went back to punch out my timeclock, Johnny Johnson walked in behind me, closed the door to the office, said, where are you going. And, I said, home. And, he said, why are you going home, you're not getting any at home. And, I said I have to go home, my little boy is home. And, he again, pushed me up against the timeclock, said he could help my out while my husband was away. And, I again told him I had to go home, and he said, well, I don't know why, you're not getting any there. And, I said I would rather do without than anything you have to offer. At this time, he did let me go, and I walked out the door.

Q. Was anyone else present at that time in that office?

A. No.

Q. And, during that time was your husband at home with you?

A. No, he wasn't.

Q. What's the next incident, if there were any, that you had personal knowledge of?

A. Well, it was a couple years back, in '76, and I went into the girls' lounge and the bathroom door was closed, and I said, who's in there because I didn't see any book or anything for the waitresses, and Johnny Johnson said, I am.

Q. Let me interrupt for a second. You say you didn't see any book for the waitresses. What are you referring to?

A. Well, when the waitresses would go into the restroom, they always would take off their gun belt and their book and put it on a chair in the lounge. And, you could usually tell by the name on the book who was in the bathroom.

Q. Okay, how do you know it was Johnny Johnson who answered?

A. Because he said, I am.

Q. Well, how do you know it was him?

A. Well, later I saw him come out.

Q. How much later was that, do you recall?

A. Oh, it was a couple minutes later. And, I talked to him.

Q. Okay, please continue before I interrupted you.

A. Okay, when I asked him who was in there, he said, I am and it's up and I can't get it down. And, he said, would you come in and help me. And, I said, no, I don't think so. And, he said, if you don't I'm going to have to lay it down on the side and raise up the lid and hit it real hard. Otherwise I'm going to have to go back out in the restaurant like this. And, I said, when you come out, just don't tell me what you've done. And, I went back out into the restaurant and I think I told Sandy or one of the other girls. The gross remark that he had just made.

Q. Okay, when's the next incident that you can recall that you have personal knowledge of?

A. Well, with Johnny that was about the only time that he ever really said or did anything.

Q. How about anybody else in the other managers at the restaurant?

A. Oh, Don Kalfus up until almost the time I left when he would come up and ask me when we was going out. When he was going to get the date I promised him. And, he would put his arms around you and kiss me on the neck and —

Q. Did you make any response when he asked you when he was going to get the date you had promised him?

A. I told him I didn't promise him one. And he said, no but we are going out aren't we.

Q. Okay, when did — you said this happened on more than one occasion?

A. Well, it happened on a number of occasions where he'd walk up and kiss you on the neck.

Q. How about this occasion where he said, — asked you if you wanted to go out with him. This particular one.

A. Well, he had told me, you know, he had asked me out off and on, quite a few times.

Q. Are there any other incidents where you can recall where you were personally involved?

A. Oh, I was involved with — Don came up to us one day at the —

Q. Who's us?

A. Me and Penny Toms. Penny Toms was standing there when he first came up and approached us and started talking. And, he asked if I could tell if he was right handed or left handed. And, I said, how would I know that, and he said can't you tell which side is it's on.

Q. I'm sorry.

A. He said could I tell which side it was on.

Q. Okay, did you make any response?

A. I said, not really and he said, if you can't tell by looking, you can start feeling.

Q. When was the next incident that you can recall? That you were personally involved in?

A. I think other than him walking up and asking me for a date or something, that's about all.

Q. Okay, were you aware of any, or did you learn of any other incidents involving other waitresses?

A. Well, I had seen Don the day he came into the lounge and attempted to kiss Carla.

Q. When was that?

A. That was about four (4) months before I quit. It was early '78, sometime then.

Q. Okay, and what did you observe on that occasion?

A. I observed Don coming out of the — I think he was in the bathroom or he came into the lounge on his way in, and Carla was standing by the blackboard. He put his arms around her to a way where he was kind of pinning her towards the blackboard. And, he gave her a hug and as he started to give her a kiss, Carla ducked under his arm and went right out the door.

Q. Okay, did you observe any other incidents involving other waitresses that you can recall?

A. I observed Sandy after she'd been kissed but I didn't observe her getting kissed, no.

Q. What instance are you referring to now?

A. It was back, after, well, right when I first went there. The day that she came out of the kitchen and she told us that Don and — she had been told to take him a cup of coffee. She took it back there, he had held her and gave her a kiss in front of all the cooks and embarrassed her then.

[Pages 892–96]

Q.[By Mr. Katz, Attorney for Restaurant] Do you know of anybody who's ever been fired for not coming in due to illness over the Christmas holiday season? At the Big Apple?

A.[By Ruth Helton] Not that I can recall, no.

Q. So, in seven and a half years, as far as you know, no one has ever been dismissed for losing time due to illness over the Christmas holiday season, right?

A. No, I don't remember anybody ever being fired for it.

Q. Okay. Ever tell off colored jokes at the restaurant?

A. Sometimes, to the girls.

Q. How frequently?

A. What do you mean by off color?

Q. Well, you said sometimes, what did you mean when you said sometimes off color? How do you interpret it?

A. Well, I mean sometimes we'd tell Polack jokes or whatever.

Q. I'm thinking of dirty jokes. Jokes involving sex or something like that. Did you ever tell any jokes like that?

A. Sometimes, if there's just girls around.

Q. In the restaurant?

A. In the lounge.

Q. And, ever tell it in the restaurant to anyone who was not a waitress? Busboys, management people, anything like that?

A. I can't recall just ever telling them a dirty joke. Now, if they came in when we was telling one, we didn't hush.

Q. What was the atmosphere like at the Big Apple Restaurant in terms of the relationships between males and females who worked there? Was it a very stiff formal relationship or was it something else?

A. Some of it it was stiff and formal, it was according to who you were.

Q. How about you, what was your relationship with the people you worked with?

A. I thought it was pretty good.

Q. Was it stiff and formal or was it casual and friendly?

A. With Suzie and Sherry it was casual and friendly.

Q. Did you consider Suzie to be a friend of yours?

A. I had.

Q. You described some incidents that you referred to some unwarranted sexual advances. Did you discourage or encourage such advances?

A. I discouraged them, as far as I was concerned.

Q. Did you complain about them?

A. I had told people about them.

Q. Did you complain about them to anyone in management?

A. Did I complain about them?

Q. Complain about them?

A. I had said that I didn't think it was right. And, they had just told that this were the way things were.

Q. To whom did you tell that you didn't think it was right?

A. I told Suzie. I didn't really tell her — it hurt my feelings a lot that he had did this at a time whenever my husband was away and that I was already feeling down.

Q. This was in 1974?

A. Yes.

Q. Okay, after that in 1974 did you ever complain to anybody about unwarranted sexual advances?

A. No, I never really complained about them.

Q. Okay, did you ever file a charge with the equal Employment Opportunity Commission or anything like that?

A. No.

Q. Did you ever feel that it had an adverse impact on your job in any way? That you didn't submit to a sexual advance?

A. Well, I seen some of them getting —

Q. Your job, did it ever have an adverse impact on you, your job?

A. No, I was allowed to do pretty much what everybody else was.

Q. Did you ever have any trouble discouraging an advance or putting it off? Did you ever tell them to leave me alone and they didn't stop, or did they stop when you said leave me alone?

A. Sometimes they did, but they always came back and tried it again.

Q. Did you consider it flirtatious?

A. Did I consider it what?

Q. Flirting? Were they flirting with you? Playing around, teasing, kidding?

A. No, I didn't take it that way.

Q. The last sexual advance that Johnny Johnson ever made to you was in 1975 wasn't it? That was the last time anything like that ever happened to you, from Johnny Johnson?

A. Around '75 or '76 somewhere around there.

Q. Well, let's try and recall, was it '75 or '76 or what?

A. I really can't tell you the exact year. I know it was '75 or '76.

Q. Other than the incidents you described, with Johnny Johnson and Don Kalfus, were there any other sexual advances made to you? By management personnel?

A. Not that I can recall. I'm sure there was, but I can't remember them off hand.

* * * * *

[Pages 898–901]

REDIRECT EXAMINATION

BY MR. PETTIBONE:

Q. Just a couple of quick questions, Your Honor. Ruth, with respect to that last item on the handbill. The restroom, what facts did you have of your own personal knowledge to support your belief that that was true?

A.[By Ruth Helton] I had been in the restrooms lots of times when they was no paper towels, where the soap machine on the wall, but there was never any soap in it. And, there was stagnated water in the shower stall that was in there because the sawdust bags when they were thrown in there had clogged up the — the sawdust had clogged up the drain to the shower. The water had been turned on or had been leaking and there was a half an inch or so of water in there.

Q. When was that?

A. This was right before I quit.

Q. Can you give us what month that would have been in?

A. I know that they painted it — the part back there — it was in August.

Q. And, when you said they painted it — you're referring to what?

A. They painted the back portion of the bathroom and I recall asking a week before I was fired. And, I remember asking the guy if he was going to paint the outside and clean out the shower and he said, no that they was just going to paint that portion back there and that later on maybe they'd get around to doing the rest of it.

Q. Is that the occasion when you observed this stagnated water?

A. Yes.

MR. PETTIBONE. No further questions.

RECROSS EXAMINATION

BY MR. KATZ:

Q. When was the date when you observed the water?

A. Well, it was in there, you know, in July, all of July.

Q. Of what, '78?

A. Yes.

Q. Where did the water come from?

A. There was a shower stall and the sawdust had clogged up the drain and someone had turned on the shower or the shower constantly dripped.

Q. Isn't it true that that shower hadn't been connected to any water for about ten (10) years?

A. No, that's not true.

Q. Have you ever seen that shower used?

A. I never seen it used, but I've seen water dripping out of it a lot of times.

Q. Did you report that condition to somebody? When you saw that?

A. When I saw the water?

Q. Yes, did you tell somebody about it?

A. I just mentioned to Suzie one day, it was really filthy in there, and Jean Johnson overheard me, and she said, yeah, they was going to get it painted and cleaned up.

Q. And, was it then cleaned up?

A. The back part was painted but no, it wasn't cleaned up.

Q. Nobody cleaned up the water on the floor?

A. It wasn't on the floor. It was in the shower. They was — the shower came up about this tall, and the water was inside the shower.

Q. What do you mean inside the shower, you mean, what was it clinging to, what was the water on?

A. It was in the bottom of the shower. The shower was like a partition like this and it was in here.

Q. It was in the floor of the shower?

A. Yeah.

Q. Did anybody clean it up?

A. Not to my knowledge.

Office-Supreme Court, U.S.
FILED
AUG 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2257

In the Supreme Court of the United States

OCTOBER TERM, 1982

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20503
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CANDACE M. CARROLL
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner filed a lawsuit against employees in state court in order to punish one employee for filing unfair labor practice charges against petitioner; to punish several employees for picketing petitioner; to discourage employees from the further exercise of their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. 157; and to interfere with a pending Board proceeding.

2. Whether the Board properly ordered petitioner to cease prosecuting its civil action against the employees.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 9

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Associated General Contractors of North Dakota v. *NLRB*, 637 F. 2d 556 11

Clyde Taylor Co., 127 N.L.R.B. 103 9

George A. Angle v. *NLRB*, Nos. 79-1548 and 80-2057 (10th Cir. July 16, 1982) 9, 10

International Organization of Masters, Mates and Pilots (Cove Tankers), 224 N.L.R.B. 1626, aff'd, 575 F. 2d 896 9

Linn v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 11

Lodges 743 and 1746, International Association of Machinists v. *United Aircraft Corp.*, 534 F. 2d 422 10

NLRB v. *Nash-Finch Co.*, 404 U.S. 138 14

Power Systems, Inc. v. *NLRB*, 601 F. 2d 936 ..... 9, 10

Sears, Roebuck & Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180 ..... 12, 13

Page

Cases—Continued:

Television Wisconsin, Inc.,
224 N.L.R.B. 722 9

United Credit Bureau of America, Inc. v.
NLRB, 643 F. 2d 1017, cert. denied,
454 U.S. 994 9-10

*United Stanford Employees, Local 680
(Leland Stanford Junior University)*,
232 N.L.R.B. 326 9

Universal Camera Corp. v. *NLRB*,
340 U.S. 474 11

Statute:

National Labor Relations Act, 29 U.S.C.
151 *et seq.* 2, 9, 11, 12, 13

Section 7, 29 U.S.C. 157 .....
Section 8(a)(1), 29 U.S.C.
158(a)(1) 2, 5, 6, 11, 14
Section 8(a)(3), 29 U.S.C. 158(a)(3) 2, 5
Section 8(a)(4), 29 U.S.C.
158(a)(4) 5, 6, 14

28 U.S.C. 2283 ..... 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A13) is reported at 660 F. 2d 1335. The decision and order of the National Labor Relations board (Pet. App. A14-A57) are reported at 249 N.L.R.B. 155.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1981. A petition for rehearing was denied on March 2, 1982. The petition for a writ of certiorari was filed on May 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages A1-A2 of the petition.

STATEMENT

1. Ruth Helton was discharged from her job as a waitress in petitioner's restaurant, Big Apple East, on August 8, 1978 (Pet. App. A4, A24). The discharge occurred within days after she suggested to other waitresses that they should get a union to represent them (*id.* at A4, A22-A24). Helton was told that she was being terminated because of her "attitude" and because a member of management did not like a question she had asked at a recent meeting (*id.* at A4, A24). On August 9, Helton filed a charge with the National Labor Relations Board, and on September 20 the General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging Helton for engaging in protected, concerted activities (*id.* at A4-A5, A19, A24).

Meanwhile, on September 18, waitresses Nichols, Scott, and Michaud walked out of the restaurant to protest Helton's discharge and their unfair treatment (Pet. App. A4, A8, A30-A32). On September 20, the day the unfair labor practice complaint was issued, the three joined Helton and a few others in picketing the restaurant (*id.* at A5, A32). Their picket signs said that petitioner had been accused of unfair labor practices and asked the public to boycott the restaurant (*id.* at A5, A32). The pickets walked along the sidewalk in front of the restaurant and crossed two driveways leading to the restuarant's parking lot, but they did not block access to the lot or to the restaurant. At no time did the pickets number more than seven adults and two children (*id.* at A5, A10, A32, A41-A42).

Shortly after the pickets first appeared, Manager Sturgeon, a member of the family that owns and operates petitioner, confronted them and took down their names (Pet. App. A5, A21 A32-A33). She said, "[y]ou might think you're funny, but I intend to have the last laugh. I will get

even with you for what you're doing." She also said, "[y]ou're going to all pay for this," and she told Helton, "Ruth, I'll get even with you if it's the last thing I do" (*id.* at A5, A32-A33). That afternoon, petitioner's president, Gene Johnson, telephoned waitress Nichols and asked to speak to her husband (*id.* at A5, A33-A34). Johnson asked Carl Nichols why he and his wife had been picketing the restaurant. When Nichols said it was to protest Helton's discharge, Johnson responded that she would hate to see the Nichols lose their new home and "get hurt by all of this" (*id.* at A5, A33-A34).

Picketing continued on Thursday and Friday, September 21 and 22 (Pet. App. A5, A34). On the latter date, the pickets distributed a leaflet that stated (*id.* at A5-A6, A34-A35):

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT * * * FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8, after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> * Eight hour shifts with no specified breaks.
> * No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.

- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, petitioner filed a civil complaint in state court against Helton and the pickets. The complaint alleged that they had engaged in mass picketing, had blocked public access to the restaurant, and had created a threat to public safety. The complaint also alleged that the pickets had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the [NLRB]." The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the pickets from trespassing, mass picketing, violence, interfering with the restaurant's business operations, and publishing false and misleading statements about the restaurant and its management (Pet. App. A6, A35). At the same time, petitioner filed a motion to shorten the time for taking depositions and to permit the deposition of Helton and her husband just two days later on September 27 (*id.* at A36). Notices of depositions on September 27 were served on all the defendants (*ibid.*).

The hearing on the temporary restraining order was scheduled for noon that same day (Pet. App. A36). The hearing was attended by three of the pickets, none of whom was represented by counsel. The court issued an order granting most of the relief requested, but refused to enjoin

the distribution of leaflets or picketing by small groups (*id.* at A6, A36; Tr. 339-340, 137-138; GCX 2(e)). The hearing on the request for a preliminary injunction was set for October 5 (*id.* at A6, A36).

On September 26, the picketing continued, and Helton retained an attorney to represent her (Pet. App. A6, A36). On October 2, petitioner's attorney deposed Helton and asked numerous questions about the nature and extent of her union activities, the identities of other employees involved in union activities, and management's knowledge of those activities (*id.* at A6, A11, A37). Helton and the other defendants were also questioned about matters relevant only to petitioner's defense in the pending unfair labor practice proceeding (*id.* at A37). On November 16, the state court denied petitioner's request for a preliminary injunction. The suit for a permanent injunction and damages is still pending (*id.* at A6, A38).

2. Adopting the decision of the administrative law judge, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discharging Helton because of her union activities, and that petitioner had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening the pickets with reprisals. The Board also found that petitioner had violated Section 8(a)(1) and (4) of the Act, 29 U.S.C. 158(a)(1) and (4), by initiating the lawsuit in order to punish Helton for filing the unfair labor practice charges, to punish Helton and the others for picketing the restaurant, to discourage them from engaging in other protected, concerted activity, and to interfere with the pending Board proceeding. Finally, the Board found that petitioner had violated Section 8(a)(1) and (4) of the Act by deposing the defendants concerning the subject matter of the pending unfair labor practice proceeding for the purpose of circumventing the Board's

restrictive discovery rules and gaining access to the General Counsel's case (Pet. App. A14-A15, A29, A32-A52).[1]

In finding that the filing of the lawsuit was unlawful, the administrative law judge concluded that petitioner "did not have a reasonable basis for the filing of its lawsuit" (Pet. App. A40). He found no basis for petitioner's allegation in its complaint that the leaflet contained false, outrageous, or malicious statements, or for the allegations that the pickets blocked the sidewalk and harassed customers, and he termed "pure folly" petitioner's allegation that, contrary to the picket signs, no boycott or strike was in progress (*id.* at 40-41). Similarly, he found that the leaflets contained no "misrepresentations concerning the Board's proceeding[s]" and accurately reflected the waitresses' complaints (*id.* at A41).

The Board ordered petitioner, *inter alia*, to reinstate Helton with backpay, to reinstate the three striking waitresses,[2] to withdraw the civil suit, and to reimburse Helton and the other defendants in that suit for the legal expenses they had incurred as a result of that action (Pet. App. A14-A15, A42-A55).

3. The court of appeals upheld the Board's decision and enforced its order.

The court found "substantial evidence in the record to support the Board's findings that the restaurant's lawsuit

---

[1]The Board also found that petitioner had violated Section 8(a)(1) of the Act when, after Helton's discharge, a member of management twice asked a hostess whether Helton was having "any contact with any of the girls" and whether any of the other waitresses were talking about the union. In addition, the Board found that petitioner had violated Section 8(a)(1) and (4) of the Act when a member of management questioned a former employee about a supervisor's knowledge of employee union activities (Pet. App. A29-30, 38, 51-52).

[2]Although the Board upheld the judge's finding that the waitresses were not discharged, it concluded that they were entitled to reinstatement as unfair labor practice strikers (Pet. App. A-14 n.2).

lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity" (Pet. App. A10). The court noted (Pet. App. A10-A11):

> The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated * * *. The mass picketing alleged in the complaint never materialized * * *.
>
> The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with 'actual malice' * * *. [T]he restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements.

The court also relied on management's threats to Helton and the pickets, including Manager Sturgeon's promise to "get even with you if it's the last thing I do" (Pet. App. A11-A12).

The court rejected petitioner's contention (Pet. App. A11) that "its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction." The court stated (*ibid.*) that "[m]ore than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis."

The court further rejected petitioner's assertion that the Board could not order the employer to withdraw the state court action, stating (Pet. App. A12):

> Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice.

The court added (Pet. App. A12-A13):

> It is true that the regulatory scheme established by the National Labor Relations Act does not of itself preempt state court jurisdiction over actions for libel arising in a labor context. *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 * * * (1966). The Supreme Court has recognized the potential of such state suits for interference with federally protected rights, however, and has consequently ruled that all state libel actions are preempted unless they are based upon defamatory statements published with knowledge of their falsity or with reckless disregard of truth or falsity. *Id.* at 65. This carefully drawn boundary between legitimate state and federal interests would be hopelessly obscured if a libel action was automatically sustainable so long as the plaintiff carefully drafted its complaint to allege malice. The proper test of the legitimacy of the state action is whether the plaintiff has evidence to support its allegations of malice. * * *
>
> The state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations. The same determination, however, is one which the Board must make to decide whether filing the libel suit was an unfair labor practice. Since the Board has actually decided the issue, and the subject is central to the enforcement of federal labor policy, the Board's decision would appear to preempt further action by the state court * * *. Whether or not the state court's jurisdiction is technically preempted, however, the Board has the power to enjoin a state court lawsuit when the impropriety of that lawsuit is properly addressed and adjudicated by the Board.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. As the court of appeals correctly stated (Pet. App. A9), "it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective."[3] See *George A. Angle* v. *NLRB*, Nos. 79-1548 and 80-2057 (10th Cir. July 16, 1982), slip op. 6-7; *United Credit Bureau of America, Inc.* v. *NLRB*, 643 F. 2d 1017, 1022, 1023 (4th Cir.), cert. denied, 454 U.S. 994 (1981); *Power Systems, Inc.* v. *NLRB*, 601 F. 2d 936, 939 (7th Cir. 1979). Petitioner does not appear to dispute this principle. Rather, it contends (Pet. 4, 5, 6-7) that the Board could not inquire into petitioner's actual motivation for filing the suit because petitioner's civil complaint had "a lawful objective on its face," *i.e.*, it stated a claim upon which relief could be granted under state law. There is no merit to this contention. The "potential chilling effect of * * * lawsuits [filed in retaliation for seeking recourse to the Board]" *(United Credit Bureau, of America, Inc., supra,*

---

[3]It is the Board's policy that it "should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice," but that a lawsuit, or a threat to file one, nevertheless violates the Act if it is "a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." *Clyde Taylor Co.*, 127 N.L.R.B. 103, 108, 109 (1960); see also *International Organization of Masters, Mates and Pilots (Cove Tankers)*, 224 N.L.R.B. 1626 (1976), aff'd, 575 F. 2d 896 (D.C. Cir. 1978); *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 779-780 (1976); *United Stanford Employees, Local 680 (Leland Stanford Junior University)*, 232 N.L.R.B. 326, 331 (1977). As the court below noted (Pet. App. A13), the Board has rarely invoked "limitations on the right to bring suit in state court."

643 F. 2d at 1023, see *Power Systems, Inc., supra*, 601 F. 2d at 940), could not be averted if, as the court below correctly noted, only "a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis" (Pet. App. A11).

Contrary to petitioner's contention (Pet. 4-7), the standard employed by the court below—*i.e.*, whether there was a reasonable basis in fact for the state court suit[4] and whether petitioner was motivated by legitimate considerations in filing the suit—does not conflict with that of other circuits. Thus, in *United Credit Bureau, of America, Inc., supra*, a case much like the instant case, the Fourth Circuit enforced a Board order requiring an employer to terminate its civil suit against an employee because that suit lacked a reasonable basis in fact. In addition, the court specifically approved the Board's reliance upon the employer's failure to adduce any evidence to support the allegations of its suit (643 F. 2d at 1024-1025). Similarly, in *Power Systems, Inc., supra*, 601 F. 2d at 939, the Seventh Circuit did not dispute the Board's position that an improper motive could be inferred where an employer lacked a "reasonable basis for its suit." Instead, the court merely found that the employer in that case had adduced sufficient evidence to show that its suit had a reasonable basis.[5] Finally, in *George A. Angle* v. *NLRB*,

---

[4]Petitioner asserts (Pet. 4, 7, 8, 12) that the court of appeals required it to prove that it would ultimately prevail on the merits of its lawsuit in order to avoid an unfair labor practice finding. However, the court required only that petitioner demonstrate that its claim was "a colorable one" having "a reasonable basis in fact" (Pet. App. A10).

[5]The other two cases cited by petitioner (Pet. 6) are also consistent with the decision here. In *Lodges 743 and 1746, International Association of Machinists* v. *United Aircraft Corp.*, 534 F. 2d 422, 463-465 (2d Cir. 1975), the court upheld the Board's finding that an employer had not violated the Act by filing a civil suit against the union to recover for property damaged during a strike. In so doing, the court noted that "[t]he grounds for the Company's suit were not fabricated" (*id.* at 464)

supra, a case decided since the petition herein was filed, the Tenth Circuit enforced a Board order requiring an employer to terminate its state court suit against an employee for malicious prosecution in invoking the Board's contempt processes. The Court held, citing *Power Systems, Inc.*, that " 'the Board properly may examine the record for evidence of a reasonable ground for employer's civil [suit] and, finding none, may infer an unlawful objective and order appropriate relief * * *' " (slip op. at 8, n.2).

Because the court of appeals clearly applied the right legal standard in determining that petitioner committed an unfair labor practice, the remaining question is whether the court of appeals correctly concluded that substantial evidence supports the Board's finding that petitioner had no reasonable basis for filing its civil suit and that the suit was "brought for retaliation and intimidation of employees in their organizational rights" (Pet. App. A13). Those factual issues do not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 479 (1951). In any event, as shown in the Statement, *supra*, the facts amply support the Board's findings.

2. Petitioner contends (Pet. 8-9) that the decision below deprives it of the right to litigate its libel action in state court and is therefore contrary to *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).[6] Petitioner's argument is based upon a false premise. Petitioner asserts (Pet.

---

and that there was no other evidence of improper motivation. In *Associated General Contractors of North Dakota* v. *NLRB*, 637 F. 2d 556, 562 (8th Cir. 1980), the court upheld the Board's finding that an employer did not violate Section 8(a)(1) by seeking to enforce in state court a clause in a collective agreement, regardless of whether the clause was unlawful. The court held that an unlawful motive could not be inferred in the light of the Board's finding, which was supported by substantial evidence, that the filing of the lawsuit was not a tactic designed to interfere with the exercise of rights protected by the Act.

[6]In *Linn*, *supra*, 383 U.S. at 64-65, this Court limited the availability of state remedies for defamatory statements arising out of labor disputes to cases in which the plaintiff could show that the allegedly

8) that the court below held "that the plaintiff in the libel action may be denied an opportunity to prove his allegations in the state court proceeding unless he can first prove them to the satisfaction of an NLRB administrative law judge * * *." However, the court of appeals did not require a party in petitioner's position to prove its case before the Board. The court held merely that the Board may find that an unfair labor practice has been committed where the state court claim is not even colorable and is brought in bad faith and in furtherance of an unlawful objective (Pet. App. A9-A11). As the court stated (*id.* at A10), "[A]n employer who brings a good faith action against employees * * * and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits." Here, as the court of appeals held, petitioner "produced no evidence to support its suit to enjoin the picketing" (*id.* at A10) and insufficient evidence to show "a reasonable basis in fact for its libel suit" (*id.* at A11). It was only for those reasons that petitioner was ordered to withdraw its civil suit. As the court below noted (*id.* at A13), the Board has issued such orders sparingly and only in cases of clear abuse.

3. Petitioner's reliance (Pet. 9-10) on *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), is similarly misplaced. In *Sears*, this Court held that the National Labor Relations Act did not prevent a state court from entertaining a trespass claim arising out of union picketing on an employer's premises where no proceedings before the Board had been commenced and where, as a consequence, there was no other forum in which the underlying question of labor law could

---

actionable statements were made with knowledge of their falsity or with reckless disregard for the truth. It did so in order to insure that state regulation of defamation neither interfered with the Board's administration of national labor policy nor "dampen[ed] the ardor of labor debate" by permitting parties to a labor dispute to use libel suits "as weapons of economic coercion."

be adjudicated (436 U.S. at 185-187, 202, 203 n.34). Unlike the present case, which arose on petition for review of the Board's order and a cross-application for enforcement of that order, *Sears* arose from judicial proceedings in the state courts of California. Here, moreover, the Board was not required to conclude that the National Labor Relations Act divested the state court of jurisdiction of the subject matter of petitioner's suit. Rather, the Board found that petitioner's suit constituted unlawful discrimination against Helton and the other defendants based upon their exercise of rights protected by the Act, and the Board ordered termination of the suit for that reason alone. As the court of appeals observed, the Board had the power to do this "[w]hether or not the state court's jurisdiction [was] technically preempted" (Pet. App. A13). Thus, the decision in this case does not depend upon a question of preemption similar to that in *Sears*.

Furthermore, even if the *Sears* preemption analysis were applicable, it is fully consistent with the decision below. In *Sears*, the Court held (436 U.S. at 202) that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or [to] the NLRB, it must be presented to the Board." The Court added, however, that state court jurisdiction was not preempted "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so" (*id.* at 202-203; footnote omitted). Here, the Board's processes had been invoked, and the Board has found that petitioner's civil suit was groundless and was filed solely in retaliation for the defendants' protected conduct. In these circumstances, nothing in *Sears* permits petitioner to go forward with its baseless, retaliatory suit. Were petitioner's contention accepted, this Court's decision in *Sears*, which rested upon a perceived gap in the remedies available under the National Labor

Relations Act (436 U.S. at 202), would become a means of preventing the Board from affording relief for violations of that Act.[7]

---

[7]Petitioner is also mistaken in contending (Pet. 10-11) that the anti-injunction statute, 28 U.S.C. 2283, prevented the Board from requiring petitioner to dismiss its state court suit. Petitioner's argument that the subject matter of the state court suit was neither "pending before the Board nor subject to its jurisdiction" (Pet. 11) is merely a reiteration of its assertion that the Board was precluded from looking behind the state court complaint and considering the totality of the evidence. Since, as we have shown, the Board had the authority to make such an inquiry, the subject matter of the suit was of course "pending before the Board [and] subject to its jurisdiction." As the court of appeals noted (Pet. App. A12), "the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit." See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 146 (1971) ("The purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the [protection of] federal rights").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CANDACE M. CARROLL
Attorney

AUGUST 1982

DOJ-1982-08

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Lawrence Allen Katz
Susan Gaylord Gale
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999

Counsel for Petitioner

TABLE OF AUTHORITIES

Cases	PAGE
Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).	3, 5
Ball Plastics Division, 257 N.L.R.B. No. 126, 1981-82 NLRB Dec. (CCH) ¶18,319 (1981).	4
Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961).	4
George A. Angle v. NLRB, 94 Lab. Cas. (CCH) ¶13,688 (10th Cir. July 16, 1982).	2
Giant Food Markets, Inc. v. NLRB, 633 F.2d 18 (6th Cir. 1981).	5
Gulf States Manufacturing, Inc., 261 N.L.R.B. No. 119, 1981-82 NLRB Dec. (CCH) ¶18,992 (1981).	4
Hotel Employees Union, Local 681 v. Anaheim Operating, Inc., 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978).	3
Klate Holt Co., 161 N.L.R.B. 1606 (1966).	4
Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966).	3, 4, 5
Lippincott Industries, Inc. v. NLRB, 661 F.2d 112 (9th Cir. 1981).	4
Lodge 743, IAMAW v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).	5
M. R. & R. Trucking Co., 218 N.L.R.B. 1109 (1975).	4
May Department Stores Co. v. Teamsters Union, Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1976).	3
Mooi Roofing Co. v. DeYoung, 9 Mich. App. 295, 156 N.W.2d 617 (1967).	3
Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979).	2
S. E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977).	5
Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978).	5, 6
United Credit Bureau of America, Inc. v. NLRB, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981).	2

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954). 5

Statutes

29 U.S.C. §§ 151-169 3

29 U.S.C. § 160(j) 4

No. 81-2257

In The

Supreme Court of the United States

October Term 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Labor Relations Board ("the Board" or "the NLRB") has filed a Brief in opposition to the Petition for a Writ of Certiorari filed by Bill Johnson's Restaurants, Inc. ("the Restaurant"). Petitioner believes that most of the points made by the Board were fully addressed in the Petition. However, some of the Board's arguments were not specifically or directly confronted in the Petition and do warrant this brief reply.

ARGUMENT

THE BOARD ADVOCATES A LEGAL STANDARD WHICH IS INAPPROPRIATE AND IN CONFLICT WITH SUPREME COURT PRECEDENT.

In Point "1" of its Argument (NLRB Brief, pp. 9-11), the Board contends that the standard which it applied in this case, and

which was affirmed by the Ninth Circuit, has also been approved by three recent cases from three other Circuits: *George A. Angle v. NLRB*, 94 Lab. Cas. (CCH) ¶13,688 (10th Cir. July 16, 1982); *United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981); *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979). Petitioner submits that these three cases are definitely not "much like the instant case," as the Board argues (Brief, p. 10), but are in fact patently distinguishable from *Bill Johnson's* on one fundamental point.

In each of the three cases relied upon by the Board, an employer had asserted a cause of action against an employee based, according to the specific allegations of the state court complaint, upon the employee's resort to the NLRB. Thus, in *George A. Angle*, the employer's "malicious prosecution action was premised on [the employee's] involvement in the Board's initiation of civil contempt proceedings. . . ." 94 Lab. Cas. (CCH) at 21,748. In *United Credit Bureau*, the employer's civil suit was "factually based upon the employee's filing of unfair labor practice charges with the Board. . . ." 643 F.2d at 1026. And, in *Power Systems*, the employer filed a state court action "alleging that [the employee] had initiated proceedings before the NLRB and OSHA without probable cause and for the purpose of harassment. . . ." 601 F.2d at 938.

The civil suit filed by the Restaurant — in clear contrast to the three cases noted above — was not premised upon any employee's utilization of the NLRB. Instead, the complaint asserted causes of action for mass picketing, trespass, and libel based on conduct engaged in on the streets of Phoenix. See Pet. App. A-6. Thus, the standard applied by the appellate courts in *George A. Angle*, *United Credit Bureau*, and *Power Systems* has no relevance to the instant case. Indeed, prior to this case, neither the NLRB nor any Federal Court of Appeals had ever held an employer's civil suit alleging such causes of action to constitute an unfair labor practice.

The Board's position is that, when an employer's suit against an employee lacks "a reasonable basis," an "improper motive" may be inferred and an unfair labor practice may be found. NLRB Brief, p. 10. But the fallacy in the Board's far-reaching standard is reflected in the agency's citation to the three Circuit decisions discussed above without regard to the critical factual distinction we have noted. Petitioner agrees that a substantial burden is properly placed upon the employer whose civil suit is premised upon employee resort to NLRB procedures. We have no quarrel with application of the "reasonable basis" test in such circumstances. On

the other hand, a *less* substantial burden should exist where — as here — the suit is premised upon conduct *unrelated* to Board proceedings and well within the spectrum of situations historically recognized by this Court as appropriate for state court resolution. *See, e.g., Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (libel); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942) (mass picketing). With respect to that class of lawsuits, no unfair labor practice should be found as long as the suit is not pre-empted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§151-169, or dependent upon issues then pending before, or submissible to, the Board. The maintainability of the suit under state law, the evaluation of its merits, and the appropriate disposition of well-founded, or unfounded, causes of action should be consigned to the state court. The Board has no authority to determine whether such a suit has a "reasonable basis" because the Board has no interest to protect that will not be properly and adequately protected by the state court.

The NRLB asserts that, in this case, it did have a legitimate independent interest to protect because "the Board's processes had been invoked," and "the subject matter of the suit was . . . 'pending before the Board [and] subject to its jurisdiction.' " NLRB Brief, pp. 13, 14 n.7. This bootstrap argument assumes the issue rather than addresses it. The Board's processes had certainly *not* been invoked as to the issues in the state court suit (mass picketing, trespass, libel); nor were those issues "pending before the Board," until the Board — improperly, we submit — decided to review the merits and motivation of that suit. It is true that a related proceeding — the unfair labor practice complaint that Ruth Helton was discharged for union activity — was then pending before the Board, but that fact did not invalidate the state's substantial interest in controlling matters of local concern. *See Hotel Employees Union, Local 681 v. Anaheim Operating, Inc.*, 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978); *May Department Stores Co. v. Teamsters Union, Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976); *Mooi Roofing Co. v. De Young*, 9 Mich. App. 295, 156 N.W.2d 617 (1967).[1]

---

[1] The Board also asserts that the employer overreached in the depositions taken in preparation for its state court preliminary injunction motion because it asked questions relevant to the employees' union activity and to the employer's defense of pending unfair labor practice charges. NLRB Brief, p. 5. Petitioner submits that its questions were relevant to the state court proceeding and thus proper, and further points out that, even if some questions were improper, the appropriate remedy would not be to order withdrawal of the entire suit but rather to issue a cease-and-desist order, or to obtain a district court injunction, directed

The Board made a factual determination in this case that the Restaurant's civil suit "was brought for retaliation and intimidation of employees in their organizational rights" (see Pet. App. A-13), and the Board now contends that its finding does "not warrant review by this Court." NLRB Brief, p. 11. But Petitioner does not ask this Court to review the Board's factual determination. Rather, Petitioner seeks review of the Board's *authority* to make such a determination. Petitioner believes that the Board exceeds its jurisdiction when it inquires into a plaintiff's motivation for filing a civil suit which is not pre-empted by the NLRA nor based upon utilization of the Board. If the power to make such an inquiry were to be sanctioned, then any employee sued by his employer, or an employer sued by a union, or a union sued by an employee, could, merely by filing a charge with the Board, channel the suit into a preferred forum (the NLRB) and cause an examination of the plaintiff's motivation for suit. Since lawsuits are, by their nature, coercive, the plaintiff would be forced to demonstrate untainted motives on risk of having the Board order him to abandon an otherwise meritorious state court action. Simply put, if the conduct of the state court defendant is unprotected, and proven to be tortious, the plaintiff's motivation for suit is wholly irrelevant. An analogous situation occurs when an anti-union employer discharges, for good cause, an employee attempting to organize his company. The employer's desire to rid himself of a union activist does not convert a well-grounded discharge into an unfair labor practice. *See, e.g., M. R. & R. Trucking Co.*, 218 N.L.R.B. 1109, 1109 (1975); *Klate Holt Co.*, 161 N.L.R.B. 1606, 1612 (1966). *See also Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617, 621 (5th Cir. 1961).

The NLRB argues that its decision does not conflict with *Linn v. United States Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), because the Board did not require the employer to *prove* the allegations of its libel suit but only to demonstrate "a colorable claim." NLRB Brief, pp. 11-12. Yet the emasculation of *Linn* is clearly evident in the Board's definition of "colorable." When the Board argues that a "colorable" libel claim could not be founded upon publication of a leaflet proclaiming that the Restaurant refuses to pay lawful overtime, tolerates improper sexual advances toward

---

at the offensive questions only. *See* 29 U.S.C. § 160(j); *Lippincott Industries, Inc. v. NLRB*, 661 F.2d 112 (9th Cir. 1981); *Gulf States Manufacturing, Inc.*, 261 N.L.R.B. No. 119, 1981-82 NLRB Dec. (CCH) ¶18,992 (1982); *Ball Plastics Division*, 257 N.L.R.B. No. 126, 1981-82 NLRB Dec. (CCH) ¶18,319 (1981).

waitresses, and compels employees to use a "filthy restroom. . . with no soap, paper towels or toilet tissue provided" (NLRB Brief, p. 3), then the term "colorable" has indeed been abused. This was not a case in which publication of allegedly defamatory statements was in dispute, or in which evidence was allegedly fabricated;[2] on the contrary, publication of the challenged statements was documented and uncontested. Whether the document was true or false, and whether it was published maliciously, were matters to be resolved, according to *Linn*, by the state court. 383 U.S. at 64-65.

The same argument applies to the Restaurant's cause of action for mass picketing. The Board asserts that the Restaurant "produced no evidence to support" that cause of action (NLRB Brief, p. 12). But the parties do agree that, at times during the three days of demonstrations, there were at least seven adults and two children parading on the sidewalks in front of the Restaurant and periodically crossing the employer's driveway. *Id.*, p. 2. The Board also points out that the "mass picketing alleged in the complaint never materialized." *Id.*, p. 7. But that fact is irrelevant, since the Restaurant was not blessed with clairvoyance at the time it filed suit, and since the state court's issuance of a temporary restraining order was very likely the reason why mass picketing "never materialized." Accordingly, the Board's refusal to perceive a "colorable" basis to the Restaurant's cause of action for mass picketing reflects, again, an unwarranted intrusion into a garden-variety state court suit designed to limit the potential for civil disorder during a labor dispute. *See United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942). *See also Giant Food Markets, Inc. v. NLRB*, 633 F.2d 18, 25 (6th Cir. 1981) (application for state court injunction against protected picketing does not constitute unfair labor practice).

The Board argues that *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), is distinguishable because that case depended upon a finding that the state court was not pre-empted by the NLRA, whereas in the present

---

[2] *See Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). *See also S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), in which the Board held that a supervisor's $50,000 slander suit against an employee did not constitute an unfair labor practice despite the supervisor's knowledge that the suit was groundless.

case the Board found that the Restaurant's civil suit was an unfair labor practice regardless of whether the state court was technically pre-empted. NLRB Brief, pp. 12-13. By focusing on the pre-emption aspect of *Sears*, the Board has ignored the Court's underlying reasoning and has overlooked the real touchstone of that case: an evaluation of the risk that state regulation would prohibit conduct protected by the NLRA. *See* 436 U.S. at 196 n.25, 203-05. In *Sears*, this Court recognized that there may be circumstances in which some violations of state law (*e.g.*, trespass for organizational purposes) may actually be protected by the NLRA. 436 U.S. at 204. However, the Court also held that allowing state courts to hear and determine trespass suits based on arguably protected picketing would "not create an unacceptable risk of interference" with conduct which the Board might later find to be protected because "trespass is far more likely to be unprotected than protected." *Id.* at 205. Similarly, the Restaurant's civil suit for mass picketing, trespass, and libel did not create "an unacceptable risk of interference" with protected conduct because such activities, if proven, were likely to be unprotected. Furthermore, despite the Board's stated concern that the Restaurant's suit would be punitive, there was little risk that the state court would sustain the complaint in the absence of substantial evidence. Thus, as in *Sears*, there was no reason or statutory basis for barring the Restaurant from seeking a judicial resolution of its dispute with the demonstrators.

CONCLUSION

Based upon the foregoing arguments and authorities, we respectfully request that a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Lawrence Allen Katz
Susan Gaylord Gale
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999
Counsel for Petitioner

Office - Supreme Court, U.S.
FILED
DEC 6 1982
ALEXANDER L. STEVAS,

No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

LAWRENCE ALLEN KATZ
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999
Counsel for Petitioner

Of Counsel:
N. GREGORY SMITH
SUSAN GAYLORD GALE

Dated:
December 2, 1982

QUESTIONS PRESENTED FOR REVIEW

1. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees for tortious conduct occurring during a labor dispute unless the employer can demonstrate, to the satisfaction of an NLRB administrative law judge, that his suit has substantive merit and is not tainted by improper motivation?

2. May the National Labor Relations Board enjoin an employer from maintaining a state court action against his employees when the suit is not based upon employee resort to the Board or upon issues pending before the Board or subject to Board jurisdiction?

Petitioner, Bill Johnson's Restaurants, Inc., has no parent, subsidiary or affiliate companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE NLRB EXCEEDS ITS JURISDICTION WHEN IT INTERFERES WITH CIVIL LITIGATION OVER MATTERS DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY.	8
A. Employer Access To State Courts For The Redress Of Tortious Conduct During A Labor Dispute Has Received Consistent Protection From The Supreme Court.	8
B. The NLRB Has, Until Now, Adhered To Supreme Court Standards Governing Employer Access To State Courts.	13
C. The NLRB Cannot, By Deciding An Issue Over Which It Has No Jurisdiction, Preempt Proceedings In A State Court Which Does Have Jurisdiction.	17
D. The NLRB Has No Jurisdiction To Examine The Motivation Of Parties To Civil Litigation.	20
II. THE NLRB'S INTERFERENCE IN THE PARTIES' CIVIL LITIGATION WAS UNCONSTITUTIONAL, UNJUSTIFIED AND UNNECESSARY.	23

A. NLRB Intervention In Civil Tort Actions Impedes Employer Access To The Judiciary And Denies Him A Jury Trial. 23

B. The Rights Of The State Court Defendants Were Amply Protected By Available Judicial Procedures. 29

C. The Prosecution Of The Restaurant's State Court Action, Including The Taking Of Deposition Testimony, Did Not Constitute An Unfair Labor Practice. 33

III. THE ANTI-INJUNCTION ACT BARS THE NLRB FROM ENJOINING CIVIL ACTIONS IN STATE COURTS UNDER THE CIRCUMSTANCES OF THIS CASE. 36

CONCLUSION 41

APPENDIX: A1

A. Constitutional Provisions and Statutes:
U.S. Constitution amend. VII A1

28 U.S.C. § 2283 ..... A1

29 U.S.C. § 158(a)(1) A1

29 U.S.C. § 158(a)(4) A1

29 U.S.C. § 160(j) A1

B. Transcript of Proceedings in *Price v. Bill Johnson's Restaurants, Inc.*, Civ. No. 78-830, D. Ariz., Nov. 1, 1978, pp. 37-38. ..... B1

C. Findings of Fact, Conclusions of Law, and Order (As Amended) issued in Civ. No. 78-830, D. Ariz., Jan. 22, 1979. ..... C1

D. Order issued in *Bill Johnson's Restaurants, Inc. v. Helton, et al.*, C375470, Superior Court, Maricopa County, Ariz., Mar. 15, 1979. ..... D1

TABLE OF AUTHORITIES

Cases	*Page*
Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942)	9, 16
American Radio Association v. Mobile Steamship Association, 419 U.S. 215 (1974)	20, 26
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)	7, 29, 40
Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967)	32
Assured Investors Life Insurance Co. v. National Union Associates, 362 So. 2d 228 (Ala. 1978)	31
Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	36, 37
Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442 (1977)	7, 23, 24
Baldridge v. Shapiro, 71 L. Ed. 2d 199 (Feb. 24, 1982)	33-34
Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977)	32
Bergman v. NLRB, 577 F.2d 100 (9th Cir. 1978)	15
Booster Lodge 405, IAMAW v. NLRB, 412 U.S. 84 (1973)	15
Broking v. Phoenix Newspapers, Inc., 76 Ariz. 334, 264 P.2d 413 (1953)	35
Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954)	8, 13, 37, 39
Championship Sports, Inc. v. Time, Inc., 40 Misc. 2d 407, 243 N.Y.S.2d 28 (Sup. Ct. 1963)	26
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	29
Clyde Taylor, 127 N.L.R.B. 103 (1960)	14
Community Medical Services v. Local 2665, AFSCME, 292 Pa. Super. 238, 437 A.2d 23 (1981)	11
Daly v. Superior Court, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977) (*en banc*)	31
Dazzo v. Meyers, 83 A.D.2d 14, 443 N.Y.S.2d 245 (1981)	10

EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775 (W.D. Va. 1980), *appeal dismissed*, 652 F.2d 380 (4th Cir. 1981) 27

Eden Park Health Services v. Ottley, 87 A.D.2d 967, 451 N.Y.S.2d 250 (1982) 11

Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977) 6-7, 11, 12, 13, 21

Frank Visceglia, 203 N.L.R.B. 265 (1973), *enforcement denied*, 498 F.2d 43 (3d Cir. 1974) 14

Giant Food Markets, Inc., 241 N.L.R.B. 727, *enforcement denied*, 633 F.2d 18 (6th Cir. 1980) 14

H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 7, 29, 40

Herbert v. Lando, 441 U.S. 153 (1979) 7, 35, 36

Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 766 (1964) . 10

Hotel Employees Union, Local 681 v. Anaheim Operating, Inc., 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978), *cert. denied*, 440 U.S. 914 (1979) 10

Hudgens v. NLRB, 424 U.S. 507 (1976) 19

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) 38

In re Sewell, 95 Lab. Cas. (CCH) ¶ 13,801 (4th Cir. Sept. 29, 1982) 16

Ingalls v. Superior Court, 117 Ariz. 448, 573 P.2d 522 (Ct. App. 1977) 31

Jacobs Transfer, Inc., 201 N.L.R.B. 210 (1973) 17

Jeu v. Retail Clerk's Union, Local 455, 589 S.W.2d 496 (Tex. Civ. App. 1979) 11

Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968) .. 26

Joseph v. Markovitz, 27 Ariz. App. 122, 551 P.2d 571 (1976) 30

Lawson Milk Co. v. Retail Clerks Union, Local 698, 59 Ohio App. 2d 207, 394 N.E.2d 312 (1977) 10

Leedom v. Kyne, 358 U.S. 184 (1958) 17

Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) 7, 9-12, 16-21, 28, 35, 36, 39, 40

Lodge 76, IAMAW v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 9, 12

McClinton v. Rice, 76 Ariz. 358, 265 P.2d 425 (1953) ... 30

Maryland Drydock Co. v. NLRB, 183 F.2d 538 (4th Cir. 1950) 9

May Department Stores Co. v. Teamsters Union Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1976) 10, 39

Mayer v. District Court, 198 Colo. 199, 597 P.2d 577 (1979) 32

Midland National Life Insurance Co., 263 N.L.R.B. No. 24 (Aug. 4, 1982) 19

Montefiore Hospital & Medical Center v. NLRB, 621 F.2d 510 (2d Cir. 1980) 9

Mooi Roofing Co. v. De Young, 9 Mich. App. 295, 156 N.W.2d 617 (1967) 10

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 9

Muck v. Claflin, 197 Kan. 594, 419 P.2d 1017 (1966) 32

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) ... 19

NLRB v. Boeing Co., 412 U.S. 67 (1973) 7, 18, 29, 31

NLRB v. Brown, 380 U.S. 278 (1965) 17

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) 7, 21, 22, 39

NLRB v. Granite State Joint Board, 409 U.S. 213 (1972) .. 13

NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960) 17, 29, 40

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936) 23

NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953) 9

NLRB v. Nash-Finch Co., 434 F.2d 971 (8th Cir. 1970), *rev'd*, 404 U.S. 138 (1971) 8, 13, 30, 37, 38, 39, 40

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 7, 33, 34

New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979) 11

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 73 L. Ed. 2d 598 (June 28, 1982) 7, 24

Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) 11

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) 34

Pernell v. Southall Realty, 416 U.S. 363 (1974) 24

Power Systems, Inc. v. NLRB, 601 F.2d 936 (7th Cir. 1979), *denying enforcement to* 239 N.L.R.B. 445 (1978) 16

Ross v. Duke, 116 Ariz. 298, 569 P.2d 240 (Ct. App. 1976) 11

S. E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977) 15, 35

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 6, 8, 9, 12

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 7, 12, 19, 21, 29, 39

Skaggs Pay Less Drug Stores, 189 N.L.R.B. 249 (1971) ... 27

Southern Pacific Transportation Co. v. Veliz, 117 Ariz. 199, 571 P.2d 696 (Ct. App. 1977) 31

Stacey v. Emery, 97 U.S. 642 (1878) 30

Stamatiou v. United States Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976) 30

State ex rel. Retail Store Employees Union Local 655 v. Black, 603 S.W.2d 676 (Mo. Ct. App. 1980) 10

Sumner v. Mata, 449 U.S. 539 (1981) 29

Television Wisconsin, Inc., 224 N.L.R.B. 722 (1976) 15

Timpte, Inc. v. NLRB, 590 F.2d 871 (10th Cir. 1979) 9

Todd v. Cox, 20 Ariz. App. 347, 512 P.2d 1234 (1973) .. 27

Toucey v. New York Life Insurance Co., 314 U.S. 118 (1941) 36

Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977) 26

United Aircraft Corp., 192 N.L.R.B. 382 (1971), *modified*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976) 14, 15

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) 9

United Credit Bureau of America, Inc. v. NLRB, 242 N.L.R.B. 921 (1979), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981) 13, 15

United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979) 15

Virginia-Carolina Freight Lines, Inc. 155 N.L.R.B. 447 (1965) 27

W. T. Carter & Brother, 90 N.L.R.B. 2020 (1950) 14

Zipp v. Shenanigans, 92 Lab. Cas. (CCH) ¶ 12,921 (C.D. Ill. 1980) 32

Constitutional Provisions

U.S. Const. amend. VII 1, 23

U.S. Const. amend. X 37

Statutes

5 U.S.C. § 552 (1976) 33

28 U.S.C. § 1254(1) (1976) 1

28 U.S.C. § 2283 (1976) 1, 8, 36-39

29 U.S.C. § 141(b) (1976) 29

29 U.S.C. § 157 (1976) 8, 24

29 U.S.C. § 158 (1976) 8

29 U.S.C. § 158(a)(1) (1976) 1, 4, 5, 33

29 U.S.C. § 158(a)(3) (1976) 1

29 U.S.C. § 158(a)(4) (1976) 1, 4, 5, 33, 39

29 U.S.C. § 160(j) (1976) 1, 4, 7, 28, 32, 40
4 Ariz. Rev. Stat. Ann. § 12-341.01(C) (1982) 30
16 Ariz. Rev. Stat. Ann., R. Civ. P. 12(b)(6) (1973) 30
16 Ariz. Rev. Stat. Ann., R. Civ. P. 26(c) (1973) 31
16 Ariz. Rev. Stat. Ann., R. Civ. P. 56 (1973) 30
17A Ariz. Rev. Stat. Ann., R. Proc. for Special Actions, Rule 3 (1973) 31
Cal. Civ. Proc. Code § 128.5 (West Supp. 1982) 30
Fla. Stat. Ann. § 57.105 (West Supp. 1982) 30
Ill. Code Civ. Proc. § 2-611 (1982) 30
Wis. Stat. Ann. § 814.025 (West Supp. 1982-83) 30

Miscellaneous

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972) 31
Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641 (1961) 18

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals was reported at 660 F.2d 1335. The decision of the National Labor Relations Board was reported at 249 N.L.R.B. 155. A copy of each opinion appears in the Appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 12, 1981. A petition for rehearing *en banc* was denied on March 2, 1982. A timely Petition for a Writ of Certiorari was filed with this Court on May 28, 1982, and was granted on October 18, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment. The statutes involved are: 28 U.S.C. § 2283 (1976), 29 U.S.C. §§ 158(a)(1) and (4) (1976), and 29 U.S.C § 160(j) (1976). The text of the constitutional provision and of the statutes involved is set forth in the Appendix hereto.

STATEMENT OF THE CASE

On August 8, 1978, Bill Johnson's Restaurants, Inc. (hereinafter "the Restaurant") discharged Ruth Helton, one of its waitresses. She then filed a charge with the National Labor Relations Board (hereinafter "the Board" or "the NLRB"), claiming that she had been discharged for engaging in union organizational activity. On September 20, 1978, the NLRB Regional Director issued a complaint in Case No. 28-CA-4970, alleging that Helton's termination constituted an unfair labor practice under Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter "the Act" or "the NLRA"), 29 U.S.C. §§ 158(a)(1), (3) (1976).

On that same day, Ruth Helton, together with her husband and other friends and supporters, began a series of demonstrations in

front of the Restaurant, carrying picket signs generally critical of management. [Jt. App. 76.][1] Picketing continued on September 21 and 22, 1978. [*Id.* at 78.] At various times on these days, the number of demonstrators included seven adults and two children. [Pet. App. A-5.] The Restaurant is located in a heavily-traveled section of Phoenix, and there are seats for 250 persons and parking spaces for 119 cars. [Tr. 726-28.]

At the beginning of the demonstrations, the group walked back and forth across the Restaurant's driveways, but they stopped crossing the driveways after a confrontation with one of the managers. [Pet. App. A-32.] Throughout the demonstrations, however, there were occasions when a temporary blockage of the driveways would occur as customers stopped their vehicles to talk with or listen to the demonstrators. [Jt. App. 76-77, 96-97.] At least one customer became involved in an argument with the group, and insulting remarks were exchanged. [*Id.* at 78; Tr. 277.]

On September 22, 1978, the demonstrators distributed leaflets to Restaurant customers and passersby, asserting, among other things, that the Board had issued a complaint against the Restaurant for unfair labor practices, that Ruth Helton had been discharged because of her union activity, and that waitresses at the Restaurant were denied proper overtime pay, were subjected to "unwarranted sexual advances" and were compelled to use a "filthy restroom . . . with no soap, paper towels or toilet tissue provided." [Pet. App. A-34 to A-35; Jt. App. 2.]

On September 25, 1978, the Restaurant filed a verified Complaint in the Maricopa County Superior Court, State of Arizona, alleging that the demonstrators had unlawfully interfered with the Restaurant's business operations, published libelous statements in their leaflet, and created a threat to public safety. [Jt. App. 3-9.]

---

[1]The parties' consecutively-paginated Joint Appendix shall be cited as "Jt. App." The Appendix to the Petition for a Writ of Certiorari, containing the decisions of the Administrative Law Judge, the NLRB, and the Court of Appeals, shall be cited as "Pet. App." The documents included in the Appendix to Petitioner's Brief shall be cited as "Br. App." References to the transcript of hearing before the ALJ, where not found in the Joint Appendix, shall appear as "Tr."

The Restaurant's three male co-owners perceived the sexual harassment allegation as a personal attack and joined the civil suit as named plaintiffs. [Jt. App. 109.] The cause of action for libel alleged that the defendants had published false statements "knowing them to be false or in reckless disregard of whether they were false," that the statements "have caused injury to the plaintiffs' business," and that the statements "have impeached the honesty, integrity and reputation of the individual plaintiffs." [Jt. App. 6-7.] The Complaint sought (a) an injunction against mass picketing (but not all picketing), violence, trespass, and obstruction of Restaurant driveways, (b) an injunction against the continued publication of libelous statements, and (c) compensation for the damages suffered as a result of these unlawful acts. The Complaint included a request for a temporary restraining order. [Jt. App. 7-8.]

The case was assigned to the Honorable Marilyn Riddel, who, on September 25, 1978, heard testimony from three of the defendants on the allegations of the Complaint. [Jt. App. 94-95.] Upon the completion of the hearing, the Judge issued a temporary restraining order, prohibiting the demonstrators from trespass, violence or threats of violence, interference with customer access to the Restaurant, and the use of more than four demonstrators in front of the Restaurant; however, she refused to enjoin the alleged libel. [Jt. App. 19-22.] Judge Riddel also signed orders (a) setting October 5, 1978, as the date for a hearing on the Restaurant's application for a preliminary injunction, and (b) allowing expedited discovery in preparation for such hearing. [Pet App. A-6, A-36.]

On the following day, September 26, 1978, Helton filed a second charge with the Board, alleging that the Restaurant's suit had been instituted in order to harass and coerce employees because of their union activities. That same day, counsel for the Restaurant advised counsel for the demonstrators that his depositions scheduled to be taken in connection with the preliminary injunction motion would include questions on the deponents' knowledge of the truth or falsity of the statements in the leaflet, including the assertion that Helton had been fired for union activity. [Pet. App. A-36 to A-37; Jt. App. 57.] On September 28, 1978, the defendants in the state court action filed a motion for a protective order seeking to limit the scope of examination at their depositions. [Jt. App. 23-31.] After a hearing, Judge Riddel ruled that the Restaurant could ask

questions "regarding the statements made publicly in Maricopa County, and the basis for those statements," but could not inquire into any statements made to NLRB investigators.[2] [Jt. App. 39.] The Restaurant then took depositions on September 29 and October 2, 1978, eliciting facts regarding the deponents' conduct during the demonstrations and probing the factual bases for the statements in the leaflet. [Pet. App. A-6.] The defendants in turn deposed several Restaurant officials. [Jt. App. 65-66.]

Helton's second NLRB charge was thereafter amended on October 3, 1978, to include an allegation that the lawsuit had been instituted because she had previously filed a charge with the Board and because she and her supporters had given testimony to the Board. On October 23, 1978, the Board issued a Complaint in Case No. 28-CA-5041, alleging, *inter alia*, that the Restaurant's filing and prosecution of its civil lawsuit (1) violated Section 8(a)(1) of the Act because it interfered with, restrained and coerced employees in the exercise of their rights under the Act, and (2) violated Section 8(a)(4) of the Act because it discriminated against employees for filing charges or giving testimony to the Board.

On October 27, 1978, the Regional Director, acting under authority of Section 10(j) of the NLRA, 29 U.S.C. § 160(j) (1976), filed a petition for injunctive relief in the United States District Court for the District of Arizona, Civil No. 78-830-PHX-WEC. The petition alleged that the state court action filed by the Restaurant was coercive, was intended to impede employee access to the Board, and was filed in retaliation for employee participation in protected activities. The Regional Director requested an order requiring the Restaurant to withdraw its state suit. Following a hearing on November 1, 1978, District Judge Walter E. Craig announced that he would deny the Board's petition. Thereafter, Judge Craig entered a formal order denying the General Counsel's request for an injunction and specifically finding: (1) that the NLRB had no reason-

---

[2]Just before issuing her order, Judge Riddel asked counsel for the demonstrators if his clients would be willing to cease, until completion of the Board's proceedings, their public (non-Board) statements that Ruth Helton had been discharged for union activity. The defendants declined to provide such assurances. [Jt. App. 38-39.]

able cause to believe that the Restaurant had filed its state court action for a coercive or discriminatory purpose or intended to interfere with NLRB processes, and (2) that the Restaurant's lawsuit demonstrated, on its face, that it was filed for lawful objectives. [Br. App. "C".]

On November 13, 1978, the defendants in the state court proceeding filed counterclaims alleging abuse of process, malicious prosecution, wrongful injunction, libel and slander. [Jt. App. 40-51.] The following month, hearings on the two NLRB Complaints were held before an Administrative Law Judge (hereinafter "the ALJ"). While the ALJ was considering his decision, the parties in the state court suit cross-moved for summary judgment. On March 15, 1979, the state court judge issued an order dismissing the Restaurant's cause of action for business interference and the defendants' counterclaim for abuse of process, but leaving the parties' libel claims for trial. [Br. App. "D".]

On September 27, 1979, the ALJ rendered his decision, ruling that Helton had been discharged for her union activities, and that the Restaurant's suit had been motivated by a desire to coerce and intimidate employees engaged in protected activity, in violation of Sections 8(a)(1) and (4) of the Act. His conclusion regarding the motivation for the lawsuit was based upon his finding that the suit lacked "a reasonable basis" and that two managers had made general threats on the first day of picketing. [Pet. App. A-39 to A-42.] His order required the Restaurant to withdraw the Complaint it had filed in state court, and to reimburse the defendants for all legal expenses incurred in the suit, including expenses incurred in the prosecution of their counterclaims. [Pet. App. A-53 to A-57.]

The Restaurant thereafter submitted to the NLRB numerous exceptions to the ALJ's ruling. On April 30, 1980, the NLRB affirmed the ALJ's ruling with only minor modifications. [Pet. App. A-14 to A-18.] On May 20, 1980, the Restaurant petitioned the United States Court of Appeals for the Ninth Circuit to review and set aside the Board order. The NLRB thereafter filed a cross-application for enforcement of its order. Oral argument was held on April 15, 1981. In its decision dated November 12, 1981, the Ninth Circuit ordered enforcement of the Board's order in its entirety. [Pet. App. A-3 to A-13.]

The Ninth Circuit ruled that the Restaurant's civil complaint "had a lawful objective on its face" but that the Board had properly found that the suit "lacked a reasonable basis in fact" and had been "filed in bad faith to retaliate against the picketers." [Pet. App. A-10] Acknowledging that the NLRA "does not of itself preempt state court jurisdiction over actions for libel arising in a labor context," the Ninth Circuit nevertheless held that "since the Board has actually decided the issue, the Board's decision would appear to preempt further action by the state court." [Pet. App. A-12 to A-13.] The Ninth Circuit also held that, even if the state court was not preempted, the Board retained the power to enjoin such an action "when the impropriety of that lawsuit is properly addressed and adjudicated by the Board." [Pet. App. A-13.]

The Restaurant subsequently filed a Petition for Rehearing *en Banc* with the appellate court, which was denied on March 2, 1982. [Jt. App. 1.] The Petition for a Writ of Certiorari followed on May 28, 1982.

SUMMARY OF ARGUMENT

Under the principles of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), states must yield to the primary jurisdiction of the NLRB with respect to activities protected or prohibited by the Act, unless the regulated conduct is of peripheral concern to the Act or involves interests deeply rooted in local feeling and responsibility. States have a compelling interest in maintaining domestic peace and in providing judicial remedies for tortious conduct. Blocking such remedies would create disrespect for the law, encourage the victim to utilize self-help, and increase the potential for violence. The Restaurant's civil action for tortious interference with its business and for malicious libel was not preempted by the NLRA, was not dependent upon issues pending before, or submissible to, the NLRB, and was not directed toward securing relief prohibited by the NLRA. Furthermore, the Board has no expertise in libel or in other torts, and can offer no relief for the personal injury suffered by the tort victim. The appropriate disposition of well-founded, or unfounded, causes of action for tortious conduct lies with the state court, and the Board had no authority to order the withdrawal of the Restaurant's civil action. *Farmer v. United*

Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).

An employer is denied his constitutional guarantee of a jury trial when the NLRB makes factual determinations relative to the employer's civil suit to enforce private rights, and then rules that he must withdraw that suit due to insufficient evidence. *See Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977). *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 73 L. Ed. 2d 598 (June 28, 1982). Moreover, requiring an employer to establish to the satisfaction of an administrative law judge that his civil tort action is well-founded and that his motivation for suit is untainted results in conflicts in the functions of the Board and the state court, unduly burdens employer access to the judiciary, and allows persons who commit torts against their employer to avoid judicial process. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

The state court system is able to protect employees from groundless employer litigation, and state courts are better equipped than the NLRB to evaluate the propriety of civil tort actions. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *NLRB v. Boeing Co.*, 412 U.S. 67 (1973). The Board has expressed concern that employer litigation will become a vehicle for improper discovery relevant to pending Board cases, but any such abuses of the discovery process can be regulated by the state courts. In addition, when employer discovery threatens to interfere with Board proceedings, the Board may seek a properly-limited injunction under 29 U.S.C. § 160(j). The Board's interests can be adequately protected without requiring the employer to abandon its state court litigation.

The Restaurant's discovery was relevant and necessary to the issues raised in its civil action. *See Herbert v. Lando*, 441 U.S. 153 (1979). The principle of *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), was not violated, because the Restaurant did not seek to discover statements made to the Board, nor the names of Board witnesses. The Board's ruling that state court discovery should be delayed until resolution of related unfair labor practice charges unreasonably restricts an employer's ability to obtain ju-

dicial relief from immediate and irreparable injury caused by tortious conduct.

The Anti-Injunction Act, 28 U.S.C. § 2283, was a bar to the Board's order enjoining the employer's state court proceedings. The issues raised by the employer's civil action were neither pending before nor submissible to the Board. Thus, the Board did not act "in aid of its jurisdiction" or to enforce its preemptive authority. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954).

ARGUMENT

I. THE NLRB EXCEEDS ITS JURISDICTION WHEN IT INTERFERES WITH CIVIL LITIGATION OVER MATTERS DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY.

A. Employer Access To State Courts For The Redress Of Tortious Conduct During A Labor Dispute Has Received Consistent Protection From The Supreme Court.

In its landmark decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court crystalized many years of particularized decisions into a general declaration of "[t]he extent to which the variegated laws of the several States are displaced by a single, uniform, national rule" of labor law. *Id.* at 241. The Court's conclusion was that the states must generally yield to the primary jurisdiction of the NLRB with respect to activities that may be protected by Section 7 of the Act, 29 U.S.C. § 157 (1976), or that may constitute unfair labor practices under Section 8 of the Act, 29 U.S.C. § 158 (1976). 359 U.S. at 244-45. Where, however, "the activity regulated was a merely peripheral concern" of the Act, or where "the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility," the Court determined that it would not, "in the absence of compelling congressional

direction," infer that the states had been deprived of power to act. *Id.* at 243, 244.[3]

Subsequently, the Court has had several opportunities to apply its *Garmon* doctrine, and particularly its significant exceptions, to situations in which one of the parties to a labor dispute has sought state court regulation of conduct occurring during that dispute. One of the most important cases was *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the facts of which are closely analogous to those of the instant case. In *Linn*, an official of the employer filed a $1,000,000 libel action against a union, two of its officers, and a company employee, following the distribution of an allegedly defamatory leaflet during a union organizing campaign. The suit was filed in federal district court based on diversity of citizenship. Prior to institution of that action, the company had also filed unfair labor practice charges with the NLRB, asserting that distribution of the leaflet had restrained and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). 383 U.S. at 55-57.[4] Notwithstanding that the defendants' conduct was arguably an unfair labor practice, this Court held that " 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances." *Id.* at 61. Furthermore, the "State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*." *Id.* at 62. No conflict with NLRB jurisdiction was found likely, because the Board's concern lay in whether publication of the statements improperly interfered

---

[3]Prior to *Garmon*, the Court had made *ad hoc* exceptions to the preemption doctrine whenever local interests were deemed superior to federal interests. *See, e.g., United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954) (interference with business); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 748 (1942) (mass picketing). The history of the *Garmon* doctrine was summarized in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290-91 (1971), and in *Lodge 76, IAMAW v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 138-39 (1976).

[4]A lawsuit and an unfair labor practice charge are not the employer's only recourse when defamatory statements are published by employees. He also has the right to prohibit the publication of such statements on his premises, and to discharge the offending employee. *See NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953); *Montefiore Hosp. & Medical Center v. NLRB*, 621 F.2d 510, 516-17 (2d Cir. 1980); *Timpte, Inc. v. NLRB*, 590 F.2d 871 (10th Cir. 1979); *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1950).

with a representation election, while the trial court's interest lay only in compensating one who had suffered personal injury due to such publication. *Id.* at 63-64. Indeed, the separate and independent, but related, concerns of the two forums made it likely that concurrent jurisdiction would be exercised in many cases in which allegedly defamatory statements were published during labor disputes.[5]

In *Linn*, the Court recognized that allowing libel suits during labor disputes did create a potential for abuse: such suits might restrain the free speech envisioned by the Act, and they might become "weapons of economic coercion." 383 U.S. at 64. To counter such potential abuse, the Court established the following standards for the state courts to follow in such cases:

(1) The plaintiff must prove that the defamatory statement was

---

[5]State appellate courts generally have held that trial courts should proceed to try civil complaints based on trespass, mass picketing, or defamation despite the existence of related NLRB proceedings. *See, e.g., Hotel Employees Union, Local 681 v. Anaheim Operating, Inc.*, 82 Cal. App. 3d 737, 147 Cal. Rptr. 510 (1978), *cert. denied*, 440 U.S. 914 (1979); *May Dep't Stores Co. v. Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976); *Mooi Roofing Co. v. De Young*, 9 Mich. App. 295, 156 N.W.2d 617 (1967); *State ex rel. Retail Store Employees Union Local 655 v. Black*, 603 S.W.2d 676 (Mo. Ct. App. 1980); *Dazzo v. Meyers*, 83 A.D.2d 14, 443 N.Y.S.2d 245 (1981); *Lawson Milk Co. v. Retail Clerks Union, Local 698*, 59 Ohio App. 2d 207, 394 N.E.2d 312 (1977); *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964). The reason for proceeding in these cases was well stated by the Illinois Supreme Court in the *May Dep't Stores* case:

> We do not consider the mere filing of a charge by the union to be sufficient to divest the State courts of the jurisdiction which otherwise results from the exceptions listed in *Garmon*. The fact that a charge is on file does not remove the compelling interests which justify the existence of State jurisdiction. The imminent threat of violence occasioned by an unauthorized trespass is not rendered less immediate by simply filing an unfair labor practice charge, nor is the State's interest in preventing violence any less significant. As a practical matter, [if the ruling were otherwise] a union could then unilaterally divest the court of jurisdiction by the mere filing of a charge regardless of its merit. We accordingly conclude that the filing of the unfair labor practice charge in the present case did not affect the jurisdiction of the circuit court.

355 N.E.2d at 11.

circulated with malice, which the Court defined to mean publication with knowledge of the statement's falsity or with reckless disregard of whether it was true or false;

(2) The plaintiff must prove the harm resulting from the statement, including injury to reputation, mental suffering, and pecuniary loss; and

(3) The trial judge must not allow excessive damage awards. 383 U.S. at 64-66.[6]

The Court continued to define precisely what conduct remained subject to state court scrutiny during a labor dispute in *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977). In that case, the plaintiff brought a state court action for intentional infliction of emotional distress, alleging that the union had engaged in outrageous and tortious conduct against him, partially through the discriminatory implementation of its hiring hall obligations. Although some of the plaintiff's allegations, if proven before the NLRB, would have established unfair labor practices, the Court, in a unanimous decision, ruled that the "potential for interference is insufficient to counterbalance the legitimate and substantial interest of the state in protecting its citizens." *Id.* at 304.[7] In order to limit such interference, however, the Court emphasized that the civil suit and any remedies must be strictly limited to the tortious

---

[6]The Court reconfirmed *Linn* eight years later in another defamation case, *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), but reversed verdicts for the plaintiffs because the trial court had failed to define "malice" properly and because the objectionable accusation ("scab") was not libelous as a matter of law. The Arizona Court of Appeals demonstrated its understanding of, and adherence to, the *Linn* and *Austin* principles in *Ross v. Duke*, 116 Ariz. 298, 569 P.2d 240 (Ct. App. 1976) (defamation suit against union official fails because plaintiff unable to satisfy Supreme Court's "malice" standard). *See also Eden Park Health Services v. Ottley*, 87 A.D.2d 967, 451 N.Y.S. 2d 250, 251 (1982); *Community Medical Services v. Local 2665, AFSCME*, 292 Pa. Super. 238, 437 A.2d 23, 29 (1981); *Jeu v. Retail Clerk's Union, Local 455*, 589 S.W.2d 496, 497-98 (Tex. Civ. App. 1979).

[7]*See also New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979) (state unemployment compensation for strikers not preempted despite significant impact on labor relations).

conduct rather than based upon the NLRA violations. *Id.* at 305-07.

One year later, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), this Court held that an employer's civil suit for trespass against a picketing union was not preempted by the NLRA, even though the union's conduct was arguably protected by the Act. *Id.* at 199-201. The Court ruled that permitting state courts to evaluate whether trespassory picketing was lawful, when the participation of the NLRB has not been invoked, "does not create an unacceptable risk of interference" with protected conduct, because "trespass is far more likely to be unprotected than protected." *Id.* at 205. The Court also noted that one of the factors historically justifying an exception to the *Garmon* doctrine was that "the conduct giving rise to the state cause of action (e.g., violence, libel, or intentional infliction of emotional distress), if proved, would not be protected by § 7 of the NLRA, and therefore there existed no risk that state regulation of the conduct *alleged in the complaint* would result in prohibition of conduct protected by the federal Act." *Id.* at 196 n.25 (emphasis in original).

This well-entrenched line of Supreme Court cases is grounded upon the following two fundamental principles: (1) in our system of federalism, the compelling state interest in the maintenance of domestic peace will not be overridden in the absence of clearly expressed congressional direction,[8] and (2) restrictions upon citizen access to the courts to redress actionable wrongs would create disrespect for the law, encourage the victim to utilize direct self-help, and increase the potential for violence.[9]

Based on these important principles, the authority of the NLRB

---

[8]*See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

[9]*See Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 64 n.6 (1966). In *Lodge 76, IAMAW v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the Court cited "our consistent recognition of the power of the states to regulate conduct physically injuring or threatening injury to persons or property." *Id.* at 151 n.13.

to restrain state court proceedings has been historically limited to the following circumstances:

(1) When the state cause of action is preempted by the NLRA. *See, e.g., NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

(2) When the state cause of action depends upon issues then pending before the Board. *See, e.g., Capital Service, Inc. v. NLRB*, 347 U.S. 501, 504 (1954).

(3) When the state cause of action is directed toward relief made unlawful by the NLRA. *See, e.g., NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972).

(4) When the state cause of action is based upon or would restrict employee access to the Board. *See, e.g., United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981).

In these circumstances, there is generally sufficient federal regulatory interest to warrant NLRB action. When the circumstances described above do not exist, the interest of the state in resolving disputes between and among its citizens assumes paramount importance, even when there is "some risk that the state cause of action . . . will touch on an area of primary federal concern." *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 303 (1977).

B. The NLRB Has, Until Now, Adhered To Supreme Court Standards Governing Employer Access To State Courts.

In view of the important principles discussed above, and this Court's consistent refusal, in the absence of direct and substantial interference with national labor policy, to deprive state courts of jurisdiction over tortious conduct, it would be troublesome indeed if the NLRB were to declare itself authorized to examine the *merits* of the plaintiff's civil action and his underlying *motivation* for such litigation in order to determine whether it could be maintained in the state court. *But that is precisely what has now happened.* Furthermore, the Board's present policy is not the culmination of several years of case-by-case maturation, but instead is a sudden and radical

departure from an approach consistently followed for more than twenty years.[10]

In the pivotal case of *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960), the Board declared that it would not interfere with an employer's right to sue his employees in state court even though that suit was "part of a bad-faith scheme to defeat union organization."[11] Eleven years later, in *United Aircraft Corp.*, 192 N.L.R.B. 382, 384 (1971), *modified*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976), the Board reconfirmed the *Clyde Taylor* rule that "the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." This rule was deemed so important by the Board that it was applied even in cases where employers sought state court relief from lawful, peaceful picketing. *See Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 729, *enforcement denied on other grounds*, 633 F.2d 18 (6th Cir. 1980). In one of those picketing cases, *Frank Visceglia*, 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds*, 498 F.2d 43 (3d Cir. 1974), the Board articulated the principle as follows:

---

[10]In the present case, the Board itself offered no explanation for such a sharp reversal, having contributed nothing to this new development beyond the standard short-form adoption of the Administrative Law Judge's opinion. [Pet. App. A-14 to A-16.]

[11]In *Clyde Taylor*, 127 N.L.R.B. at 109, the Board specifically overruled a prior decision and adopted the dissent, which stated:

> I would not find that by seeking relief through the duly constituted courts of the State of Texas, the Respondent violated Section 8(a)(1) of the Act. It may well be that, in granting such relief, a court would be acting inconsistently with governing Federal law, and, indeed, that *the Respondent's motive in seeking it here was to interfere with its employees' rights*. Nevertheless, it seems to me that this Board should accommodate its enforcement of the statute to the traditional right of all to bring their contentions to the attention of a judicial forum, rather than hold it to be an unfair labor practice for them to attempt to do so.

W.T. Carter & Bro., 90 N.L.R.B. 2020, 2029 (1950) (Herzog, Chmn., dissenting in part) (emphasis added).

> The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right.

Over the years, however, exceptions to this important principle were recognized where the object of the litigation was itself unlawful. *See Booster Lodge 405, IAMAW v. NLRB*, 412 U.S. 84 (1973) (union suit to collect coercive fines from members); *United Credit Bureau of America, Inc.*, 242 N.L.R.B. 921 (1979), *enforced*, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981) (suit for damages based on employee's resort to NLRB); *United Stanford Employees, Local 680*, 232 N.L.R.B. 326 (1977), *enforced*, 601 F.2d 980 (9th Cir. 1979) (suit to enforce illegal union membership rule). But in these cases the Board focused upon the plaintiff's declared objective for suit, as stated in the complaint, not upon his perceived ulterior motive. Thus, in *Television Wisconsin, Inc.*; 224 N.L.R.B. 722, 722 n.2 (1976), the Board held that a union's lawsuit (to enforce coercive fines) was improper "not because of the Union's subjective intent but because of the unlawful objective sought by the Union."

Until the instant case, the Board had restrained itself from intruding unnecessarily into the parties' civil litigation. For example, in *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), the Board ruled that no unfair labor practice had been committed by an employer who had filed a $50,000 libel suit against an employee, despite a finding that the employer *knew* there was no basis to the libel claim. *Id.* at 79. The Board's restraint often came in the face of obvious burdens placed on protected employee conduct by civil suits. As one appellate court observed:

> Since *Clyde Taylor*, the Board consistently has held that, *despite the coercive effect upon employees' statutory rights*, the filing of a civil suit by an employer or by a union cannot be found to be an unfair labor practice.

Bergman v. NLRB, 577 F.2d 100, 103 (9th Cir. 1978) (emphasis added). *See also Lodge 743, IAMAW v. United Aircraft Corp.*, 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976):

> But even if we assume that the company was improperly motivated . . . this alone would not make resort to the

courts unlawful so as to justify an unfair labor practice finding.

As the above citations indicate, the Board's traditional approach has been consistently approved by the appellate courts. *See, e.g., In re Sewell*, 95 Lab. Cas. (CCH) ¶ 13,801 (4th Cir. Sept. 29, 1982) (tort suit based on employer's refusal to bargain with certified union is preempted by NLRA). One notable exception is the Seventh Circuit's decision in *Power Systems, Inc. v. NLRB*, 601 F.2d 936 (7th Cir. 1979), *denying enforcement to* 239 N.L.R.B. 445 (1978). In that case, the company brought a civil action, alleging harassment, against an employee who had filed charges against it with the NLRB and with the Occupational Safety and Health Administration. The Board found that the suit had no "reasonable basis" and concluded that it had been filed to penalize the employee for resorting to the Board. 239 N.L.R.B. at 450. The Seventh Circuit refused to enforce the Board's order that the suit be withdrawn, because it found that the suit did have a "reasonable basis" — and thus did not constitute an unfair labor practice — by virtue of the fact that the defendant employee had a history of filing baseless charges against other employers and labor organizations. In reaching its decision, the appellate court did not examine the employer's motives for suit and did not determine whether a good cause of action had been stated, or was provable, under state law.

Perhaps the Board is correct that a substantial burden is properly placed upon the employer whose civil suit is premised on employee resort to NLRB procedures, and that the Board's substantial interest in protecting such resort justifies its review of the civil action. Application of a "reasonable basis" test in such circumstances may be perfectly appropriate. On the other hand, a less substantial burden should certainly exist where — as here — the suit is premised upon conduct *unrelated* to Board proceedings and well within the spectrum of situations historically recognized by this Court as appropriate for state court resolution. *See, e.g., Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (libel); *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 748 (1942) (mass picketing).

With respect to that latter class of lawsuits, the propriety of the suit under state law, the evaluation of its merits, and the appropriate disposition of well-founded, or unfounded, causes of action

should be consigned to the state court. The Board has no authority to determine whether such a suit has a "reasonable basis," because the Board has no interest to protect that will not be properly and adequately protected by the state court. Where the Board's action amounts, "not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it," then this Court must intervene. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 499 (1960). In such cases, "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965). *See also Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

C. The NLRB Cannot, By Deciding An Issue Over Which It Has No Jurisdiction, Preempt Proceedings In A State Court Which Does Have Jurisdiction.

In the present case, the Ninth Circuit recognized that "the state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations," but the court also held that, when "the Board has actually decided the [libel] issue, . . . the Board's decision would appear to preempt further action by the state court." [Pet. App. A-13.] The Ninth Circuit's circular analysis, founded upon the erroneous premise that the Board must make "the same determination" as the trial court [*id.*], has the result, at one and the same time, of depriving a state court of jurisdiction it may lawfully exercise and of granting to the NLRB jurisdiction Congress never intended it to have.

When defamation during a labor dispute is alleged, the role of the NLRB is limited to determining what impact, if any, the defamatory statement could have on employee or employer rights. *Linn*, 383 U.S. at 63. Whether the statement could be the basis of a civil cause of action is irrelevant to that determination. *See Jacobs Transfer, Inc.*, 201 N.L.R.B. 210, 219 (1973). As this Court pointed out in *Linn*, the Board has no direct relief to offer to the defamed individual:

> The injury that the statement might cause to an indi-

> vidual's reputation — whether he be an employer or union official — has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.
>
> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.

383 U.S. at 63-64. Moreover, the very inability of the Board to remedy personal defamation increases the importance of a state judicial forum being available:

> The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized.

383 U.S. at 64 n.6. Not only do the state courts thus have good *reason* to resolve such disputes, they also have the *expertise*.[12] *See NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973), in which this Court rejected the suggestion that the NLRB was a more appropriate forum than a state court for determining the reasonableness of a union fine:

> Indeed, the expertise required for a determination of reasonableness may well be more evident in a judicial forum

---

[12]See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641, 667 (1961):

> Thus, if the statements are, as a matter of state law, defamatory and untrue, an employer should have access to the usual remedies for libel or slander. Nor would this seem to be an appropriate occasion for requiring prior submission of the case to the NLRB. Not only are state courts more accustomed to dealing with such issues than is the Board, but since the very elements of the state cause of action will establish that the conduct is not federally privileged, there is little danger than the effectuation of state policy will destroy a privilege intended to be conferred by federal law.

> that is called upon to assess reasonableness in varying factual contexts than it is in a specialized agency.

Appropriately, the Board has recently confirmed its own unwillingness to evaluate alleged misstatements and misrepresentations during union campaigns. *Midland National Life Insurance Co.*, 263 N.L.R.B. No. 24 (Aug. 4, 1982).

Since the Board has no jurisdiction, no expertise, and no remedial power to bring to bear in a case of malicious libel, and since the state court is the preferred forum for such a dispute, it would seem to follow that the Board's reach would far exceed its grasp if it compelled the plaintiff employer in a libel suit to establish, to the satisfaction of an ALJ, that his suit was well-founded and his motives untainted by coercive intentions. Yet the Ninth Circuit has allowed just such an extension of the Board's power, on the theory that the Board assumes preemptive jurisdiction of a libel claim once an unfair labor practice charge is filed based on that claim. [Pet. App. A-13.]

The Ninth Circuit's conclusion was derived from a suggestion in *Sears* that a "corollary of the Court's reasoning" is that state court jurisdiction is preempted if a union, upon being asked to remove its pickets from the employer's property, files an unfair labor practice charge with the NLRB. 436 U.S. at 209 (Blackmun, J., concurring); *but see id.* at 214 (Powell, J., concurring). However, such a corollary would apply *only* because there are some circumstances in which trespassory picketing is protected, and the Board has jurisdiction to determine whether such circumstances exist. *Id.* at 204. *See Hudgens v. NLRB*, 424 U.S. 507 (1976); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). On the other hand, there are *no* circumstances in which malicious libel is protected (*Linn*, 383 U.S. at 63), and thus state court proceedings cannot be preempted merely by asking the Board to evaluate the merits of an employer's libel suit.[13]

---

[13]It was "critical" to the holding in *Sears* that the employer had demanded, before filing suit, that the union cease its trespass, so that the union would not "be deprived of an opportunity to present the protection issue to the agency created by Congress to decide such questions." 436 U.S. at 207 n.44. No such demand is necessary before filing a libel suit, however, because the Board has no similar protection issue to decide.

While acknowledging the jurisdiction of state courts to try actions for malicious libel occurring during labor disputes, the Ninth Circuit also declared that the boundary between state and federal interests will be "hopelessly obscured" if such a libel action is impervious to unfair labor practice charges merely by virtue of the inclusion of allegations of malice in the complaint. [Pet. App. A-13.] In *Linn*, however, this Court specifically addressed the fear that some libel suits "might be used as weapons of coercion," and the Court alleviated that fear by requiring the state court to dismiss the complaint unless the plaintiff can *prove* his allegations of malice. 383 U.S. at 64-65. The impact of the decision below will be to substitute the ALJ for the state court judge as the evaluator of such proof, thereby (1) denying the employer the judicial benefits of a jury, discovery, and strict rules of evidence, as well as the substantive expertise of the civil judge, and (2) denying the state the ability to regulate a matter of particular local concern. The decision below frustrates the mandate of *Linn* by enabling the employee defendant to avoid state court proceedings merely by filing a charge with the NLRB alleging that the suit is coercive.

It is the Ninth Circuit, we submit, which has misunderstood, and "hopelessly obscured," NLRB and state court responsibilities in labor disputes. Under *Linn* and related cases, the NLRB, which does *not* have jurisdiction over libel claims, is *not* required, in deciding if a libel suit constitutes an unfair labor practice, to make "the same determination" as the court in which the suit was filed. The Board need determine only whether the employer's civil action is preempted by the NLRA, seeks relief made unlawful by the NLRA, or would prohibit conduct protected by the NLRA. On the other hand, "the question of whether evidence is sufficient to make out a cause of action created by state law and tried in state courts is a matter for decision by those courts." *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 231 (1974) (union conduct not covered by NLRA; state court has exclusive jurisdiction to determine whether conduct is tortious).

D. The NLRB Has No Jurisdiction To Examine The Motivation Of Parties To Civil Litigation.

In this case, the NLRB asserts the power to examine a plaintiff's motivation for filing suit, and to declare that suit an unfair

labor practice if the motivation is deemed coercive. Furthermore, the Board will evaluate the merits of the employer's civil action as a means of determining his motivation. This broad extension of NLRB power has no foundation in the Act or in Supreme Court precedent. There is not the slightest indication in *Linn, Farmer, Sears,* or in *any* of their progeny that the state's authority to adjudicate civil tort actions arising out of labor disputes is contingent upon the NLRB's favorable evaluation of the plaintiff's motivation.[14] The Board is, to be sure, usually the appropriate forum for scrutiny of employer motivation when the parties' dispute involves allegations of unlawful discriminatory conduct. However, when the dispute, as here, is in civil litigation and involves a matter of significant local concern, the state court is the appropriate forum for resolution of all issues pertaining to that litigation, including motive where relevant.

It would substantially undermine the authority of state courts if their power to hear and determine matters of recognized local concern were subject to the perceptions of administrative law judges or federal agencies regarding the litigants' motives for suit. Indeed, from the earliest days of the NLRA, this Court has sanctioned employer resort to state courts in order to obtain relief from tortious conduct during a labor dispute even where the employer's own unfair labor practices have been pervasive. Thus, in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), the company had clearly interfered with its employees' NLRA rights in several respects, but, when the company was faced with an unprotected sit-down strike in its plant, the Court upheld its right to obtain state court relief and to discharge those strikers, and the Court refused to enforce the Board's order requiring reinstatement. Emphasized throughout the Court's opinion was the principle that the company's access to the judiciary had not been lost merely because it had engaged in unfair labor practices:

But reprehensible as was that conduct of the respondent,

---

[14]Sears, for example, might well have filed its trespass action in the hope that it would impede union organizing efforts. The picketing, which had been "peaceful and orderly," became ineffective when, by state court order, it was removed from Sears' property to the public sidewalks. 436 U.S. at 182-83 n.2.

> there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.
>
> As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress.

306 U.S. at 253-54. Elsewhere, the Court emphasized that the Board's power to remedy unfair labor practices through affirmative relief "is broad but it is not unlimited . . . [and] is remedial, not punitive. . . ." *Id.* at 257. The Court went on to state:

> The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct.

Id. at 258.

The case now before the Court suggests the need for a reiteration of the basic principles established in *Fansteel*, because the Board, having ruled that the Restaurant committed unfair labor practices during employee organizational efforts, then proceeded to strip that employer of its normal rights to seek judicial redress for tortious conduct. The Board's action gave the Restaurant's employees virtual immunity from prosecution for such conduct because it occurred during a labor dispute. Since the Ninth Circuit found that "the Restaurant's civil lawsuit had a lawful objective on its face; *i.e.*, the complaint sought relief for alleged wrongs that the state court could remedy" [Pet. App. A-10], it follows that the Board took punitive, rather than remedial, action against the Restaurant by forcing it to withdraw that suit and to compensate the defendants for all their expenses, including expenses incurred in their unsuccessful opposition to the application for a temporary

restraining order, and in their prosecution of unsuccessful counterclaims and an unsuccessful motion for summary judgment.

II. THE NLRB'S INTERFERENCE IN THE PARTIES' CIVIL LITIGATION WAS UNCONSTITUTIONAL, UNJUSTIFIED AND UNNECESSARY.

A. NLRB Intervention In Civil Tort Actions Impedes Employer Access To The Judiciary And Denies Him A Jury Trial.

The management of Bill Johnson's Restaurants was publicly accused of maintaining filthy restrooms and of sexually harassing waitresses. Had those accusations been made by strangers, the Restaurant's civil suit for malicious defamation would have proceeded in normal judicial fashion, with full discovery, pre-trial disclosure of witnesses and documents, strict rules of evidence, trial by jury, and supervision by a civil judge with expertise in state tort law. The fact that the Restaurant's accusers were employees should not operate to deprive the Restaurant of such fundamental judicial procedures.

The right to a jury trial in suits at common law, for example, is preserved by the Seventh Amendment to the United States Constitution. That right is denied when an administrative law judge makes factual determinations resulting in an order that a civil lawsuit must be withdrawn for insufficient evidence. It is true that the NLRB, in its traditional role, does not violate the Seventh Amendment's guarantee of a jury trial merely by performing its fact-finding functions and issuing remedial orders. But that is because the Board is enforcing public, statutory rights, and is adjudicating claims that do not arise under common law. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1936). In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), however, the Court differentiated between fact-finding involving "public" rights, which may be entrusted to an administrative agency without constitutional infringement, and fact-finding involving "private" rights:

> Our prior cases support administrative factfinding in only those situations involving "public rights," e.g., where the Government is involved in its sovereign capacity un-

> der an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.

Id. at 458. By requiring an employer to prove to an administrative law judge that his civil tort action, based on traditional common-law claims, has a reasonable factual basis, at the risk of an order requiring him to withdraw that suit, the NLRB has gone considerably beyond the enforcement of "public rights." Whatever peripheral concern the Board may have in protecting employees from groundless civil suits is far outweighed by the employer's constitutional right to a jury trial in a common-law suit for tortious conduct and by the interest of the state in the unimpeded exercise of its judicial functions. *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 73 L. Ed. 2d 598, 615 (June 28, 1982) (unconstitutional for Bankruptcy Court to adjudicate state-created private rights); *Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) (actions for damages to a person or property "are actions at law triable to a jury").

The NLRB now allows the employee defendant in a civil action alleging unprotected tortious conduct to bypass the judicial forum by the simple expedient of charging that the employer plaintiff's lawsuit is an unfair labor practice. At that point, according to the Board, the employer must cease his civil litigation, perhaps for months, and demonstrate that his suit has a reasonable basis and that his motivation is untainted. This procedure threatens to disturb the balance of labor-management rights and economic power established by Congress. An employer who is confronted with mass picketing, trespass, libel, slander, business disparagement, threats of violence or other torts normally subject to state court jurisdiction, may well be reluctant, in the face of the decision below, to seek appropriate and swift state court relief for fear that his legal action will appear to be retaliatory and coercive. Aggravating this fear is the Ninth Circuit's suggestion that an employer's civil suit might be restrainable by the Board merely upon a showing that the suit has a coercive *effect* on Section 7 rights: "We question whether motive should necessarily play a part in determining whether an employer violates section 8(a)(1) by filing a lawsuit, without a reasonable basis in fact, against an employee." [Pet. App. A-10.]

The court's apparent willingness to subject tort litigation to NLRB scrutiny threatens to place a great burden upon an employer's resort to the judicial process, because *all* lawsuits are coercive in nature.

In the instant case, the circumstances confronting the Restaurant by the third day of picketing compelled immediate action. Management did not have the luxury of taking time to precisely evaluate all relevant legal precedent, to determine whether it possessed admissible evidence, to consider possible defenses to its complaint, and to review the nice distinctions between permissible and impermissible business disparagement and picketing. The Restaurant was faced with crowded sidewalks, insulting handbills and a confrontation atmosphere. The pressing issue was whether to tolerate this activity, to engage in self-help, or to ask the state court for whatever judicial relief was available.

It is not significant in this case that the threat of mass picketing "never materialized" [Pet. App. A-10 to A-11], that the Restaurant's application for a preliminary injunction against tortious conduct was denied [*id.* at A-41 to A-42],[15] or that the demonstrators had "a reasonable basis" for the accusations in their leaflet. [*Id.* at A-42.] What should be dispositive is that the threat of mass picketing, the need for a preliminary injunction, and the propriety of the statements in the leaflet raised issues properly subject to state

---

[15]The fact that mass picketing "never materialized" was due in large part, we submit, to the issuance of a restraining order five days after the demonstrations began. Furthermore, the fact that a preliminary injunction was deemed unwarranted at the time the motion was heard — some *eight weeks* after the last day of picketing [Jt. App. 52] — did not mean that the restraining order was unnecessary *at the time it was issued*. The Restaurant was not blessed with clairvoyance when it filed its civil complaint and sought injunctive relief to protect its reputation and property. Escalation of the demonstrators' efforts to harm the Restaurant seemed imminent when the complaint was filed. The physical and emotional setting for the picketing — several recently terminated employees, and their friends, demonstrating on a public sidewalk in front of a busy restaurant in a heavily-traveled section of the city [Jt. App. 97-98, 105] — gave management a substantial basis for fearing a threat to private property and public welfare.

court jurisdiction.[16] Congress "did not intend to strain through the filament of the NLRA" allegations of tortious conduct that are not subject to Board adjudication. *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 228 (1974).

The approach taken by the Board in this case may act as an impediment to employer resort to the judiciary, because the employer who carries his burdens of proof in the state court will have won nothing if his evidence fails to persuade the Board's ALJ, and he may suffer the imposition of sanctions for pursuing his civil action. The Board's approach can also produce a confusion of functions and, inevitably, conflicting rulings. Indeed, that is precisely what occurred in the present case. The Restaurant obtained a limited, garden-variety temporary restraining order barring trespass, violence, and interference with customer access [Jt. App. 19-22], after a hearing at which three of the demonstrators testified [*id.* at 94-95], and it then successfully resisted the defendants' motion for summary judgment on its libel claim and obtained a ruling dismissing one of the defendants' counterclaims. [Br. App. "D".] The Board, however, ruled that the lawsuit was without a reasonable

---

[16]One of the Restaurant's concerns was that the leaflet's reference to unfair labor practices, plural, immediately above the list of alleged waitress complaints, would mislead readers into believing that the Board was reviewing several charges, not just the single charge filed by Ruth Helton. [Jt. App. 2, 111-12.] The Ninth Circuit seemed to agree with the Restaurant:

> The statements contained in the leaflets were somewhat ambiguous; it was not made clear whether all the picketers' listed complaints (which the administrative law judge found to be factually true) had been made the subject of charges by the NLRB. The restaurant may therefore have believed that the leaflets falsely characterized the NLRB proceedings.

[Pet. App. A-11.] Several courts have held that misrepresenting the nature or scope of an agency investigation can be the basis for a civil libel suit. *See, e.g., Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 818 (N.D. Cal. 1977) (defendant news service allegedly published a story claiming that the Federal Trade Commission had issued a complaint against the plaintiff for several unfair trade practices, when in fact the FTC had not charged the plaintiff with all of the practices mentioned in the story; the court found that a cause of action for libel had been stated); *Championship Sports, Inc. v. Time, Inc.*, 40 Misc. 2d 407, 243 N.Y.S.2d 28, 29-30 (Sup. Ct. 1963); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909, 913 (1968).

basis, and it ordered the employer to withdraw the suit and to pay all fees and expenses incurred by the defendants — even those incurred in opposing the application for a restraining order, in moving for summary judgment, and in prosecuting their counterclaims.[17]

The Ninth Circuit and the Board expressed great concern that an employer's civil suit has an intimidating effect on persons who participate in agency proceedings. [Pet. App. A-12, A-42.] But the defendants in the Restaurant's civil suit exposed themselves to the burden and expense of defending a lawsuit only by their *public* conduct. They could have chosen to place their grievances entirely in the hands of the NLRB, the EEOC, OSHA, or any other appropriate government agencies, and their complaints would have been privileged. *Cf. Todd v. Cox*, 20 Ariz. App. 347, 348, 512 P.2d 1234, 1235 (1973). Indeed, it has been held that an absolute privilege attaches to statements, even defamatory statements, made to a governmental agency. *See EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775, 777 (W.D. Va. 1980), *appeal dismissed*, 652 F.2d 380 (4th Cir. 1981); *Virginia-Carolina Freight Lines, Inc.*, 155 N.L.R.B. 447 (1965). But no such privilege exists where, as in the present case, the defamatory statements are published publicly. *See Skaggs Pay Less Drug Stores*, 189 N.L.R.B. 249, 252 (1971)

---

[17]The Board's order regarding reimbursement of the defendants' expenses in the lawsuit raises several troublesome questions regarding the counterclaims. Since the defendants' counterclaims were not necessary to their defense of the Restaurant's complaint, why should the defendants be reimbursed for expenses incurred in connection with such counterclaims, particularly those that are withdrawn or dismissed? In fact, the defendants' counterclaim for defamation, based on statements allegedly made by Restaurant officials at the time of Helton's discharge and during the demonstrations, is still awaiting trial. [Jt. App. 49-50; Br. App. "D".] Does the Board's order require the Restaurant to pay all *future* expenses incurred by the defendants in the prosecution of their counterclaim for defamation, whether or not they are successful? Furthermore, Helton's defamation case arose out of the same labor dispute that gave rise to the Restaurant's defamation action. Should the Restaurant be denied judicial review of its claim while Helton's claim not only receives such review but receives it at the Restaurant's expense? These questions demonstrate, we believe, the confusion resulting from the NLRB's massive and uncontrolled intrusion into the parties' civil litigation.

(lawful for employer to discharge employee for slander spoken during recess in Board hearing).[18]

By choosing to take their complaints public and to proclaim their accusations against the Restaurant on the streets of Phoenix, the demonstrators shed the protective cloak they would have worn by resorting only to the appropriate agencies. Even if some of their activities were protected, the demonstrators had no *carte blanche* to expand their activities into unprotected areas, such as the publication of malicious defamatory statements about the Restaurant's management and staff.[19] Nothing in the NLRA was intended to

---

[18]In the case at bar, the Board's deviation from established principles is reflected in the following statement contained in its decision:

> Respondent's lawsuit placed its employees on notice that if any employee files charges with the Board, *or makes public a dispute with the Respondent*, that employee is subjecting himself to the possibility of a lawsuit which will require immediate expense by having to hire private legal counsel to defend against the lawsuit and to face the possibility of having to reimburse the Respondent for legal fees and damages *if the state court upholds the Respondent's claim*.

[Pet. App. A-42; emphasis added.] We would have thought it beyond dispute after *Linn* that an employee who publicly attacks his employer (as opposed to presenting his claims to the appropriate government agency) assumes the risk that the object of his attack will seek judicial vindication, and that, if the court upholds the employer's position, the employee may properly be held liable for damages.

[19]District Judge Craig found that only *unprotected* conduct would be chilled by the Restaurant's civil suit. In denying the Board's application under Section 10(j), 29 U.S.C. § 160(j), for an injunction against the Restaurant's suit, he stated:

> I will issue an Order enjoining the Respondent here to not interfere with the National Labor Relations Board investigations and hearings. If you want that. But I'm certainly not going to enjoin an employer from bringing an action which he believes is a meritorious action for libel.
>
> Now, if that has any chilling effect — and it may have a chilling effect — but the only chilling effect this Court can see is that it may curb the tempers of a few people to the extent that they better be careful to state the truth with respect to what they may assert to be public. And if they fail to state the truth in statements to the public, then in that event, they may be called to account in a court of law.

Transcript of proceedings in *Price v. Bill Johnson's Restaurants, Inc.*, Civ. No. 78-830, D. Ariz., Nov. 1, 1978, pp. 37-38. [Br. App. "B".]

deprive an employer of the right to seek judicial redress, and to fully and effectively prosecute claims, based on the injurious public conduct of persons with whom he has a labor dispute. Indeed, in enacting the 1947 amendments to the Act, Congress declared that labor and management must "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 141(b) (1976). The limitations that the NLRB has now placed on employer access to state courts reflect an effort to intervene in labor-management disputes to an extent never intended by Congress. This Court should continue to reject such efforts. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

B. The Rights Of The State Court Defendants Were Amply Protected By Available Judicial Procedures.

Underlying the drastic relief ordered in this case by the Board and approved by the Ninth Circuit — withdrawal of the Restaurant's civil action and payment of all the defendants' expenses — is the unspoken fear that the judicial system cannot protect the defendants from a groundless suit. Indeed, the Board suggested that the defendants would be entitled to its protection even "if the state court upholds the Respondent's claim." [Pet. App. A-42.] The Board's lack of confidence in the state judicial system has not been shared by this Court. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978), for example, the Court held that "permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected does not create an unacceptable risk of interference" with conduct that the Board might find to be protected. *See NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973) (NLRB not more appropriate than state court as forum to determine reasonableness of union fine); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (state courts authorized to enforce rights founded upon federal law). *See also Sumner v. Mata*, 449 U.S. 539, 549 (1981) (state courts competent to decide federal constitutional questions).

The lawsuit in dispute here was filed in the Superior Court of Maricopa County, Arizona. That state's judicial rules, like those of

other states, afford substantial protection from unfounded suits. The Arizona Rules of Civil Procedure, for example, which closely track the Federal Rules, provide for the early dismissal of groundless claims. Thus, if a stated cause of action is legally deficient on its face, the trial court is empowered to dismiss the complaint for failure to state a claim upon which relief may be granted. 16 Ariz. Rev. Stat. Ann., R. Civ. P. 12(b)(6) (1973). If the complaint pleads a legally sufficient claim, but the undisputed facts demonstrate that the defendant is entitled to judgment as a matter of law, then the court may grant summary judgment against the plaintiff. 16 Ariz. Rev. Stat. Ann., R. Civ. P. 56 (1973). If the state court determines that the suit "constitutes harassment, is groundless and not made in good faith," then the court can assess attorneys' fees against the plaintiff. 4 Ariz. Rev. Stat. Ann. § 12-341.01(C) (1982).[20] Moreover, a defendant who has been subject to such a suit could in turn bring his own action for malicious prosecution or abuse of process. *See Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 571 (1976).[21] Finally, a defendant who is dissatisfied with trial court rulings may always turn to the appellate process, ending, in appropriate circumstances, with this very Court. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 154-55 (1971) (White, J., dissenting).

In short, there are adequate remedies available in the state

---

[20]Other states have equivalent statutes. *See, e.g.*, Cal. Civ. Proc. Code § 128.5 (West Supp. 1982); Fla. Stat. Ann. § 57.105 (West Supp. 1982); Ill. Code Civ. Proc. § 2-611 (1982); Wis. Stat. Ann. § 814.025 (West Supp. 1982-83). The Board expressed concern that the state court defendants would be compelled to incur legal expenses in defending the Restaurant's tort suit. [Pet. App. A-42.] It is true, of course, that legal costs are incurred by all litigants, but the defendants' status as picketers carried with it no special immunity from the financial burdens of the judicial system.

[21]The conditions facing the Restaurant on the third day of picketing, including the growing number of demonstrators and the escalation of their attack by distribution of the offensive leaflets, provided management with probable cause for filing its suit. Under well-established principles developed in malicious prosecution cases and analogous here, the Restaurant's *motivation* for suit should have been immaterial in the face of probable cause. *See Stacey v. Emery*, 97 U.S. 642 (1878); *Stamatiou v. United States Gypsum Co.*, 400 F. Supp. 431, 438 (N.D. Ill. 1975), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976); *McClinton v. Rice*, 76 Ariz. 358, 366, 265 P.2d 425, 430-31 (1953).

judicial system to deal with an employer who files a groundless lawsuit. Moreover, it is reasonable to assume that state courts, which regularly evaluate the propriety of civil suits, are far better equipped than the NLRB to determine whether an action is in fact groundless. *See NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973). On some occasions, a state court, misunderstanding the law or the facts, may sustain an employer's civil action that is not worthy of judicial approval, but ousting state courts of jurisdiction in favor of NLRB review of employer suits "seems an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362 (1972).

In the present case, the Court of Appeals and the NLRB both expressed concern that an employer might use state court litigation to circumvent the Board's discovery limitations and thereby interfere with its administration of national labor policy. [Pet. App. A-11, A-43 to A-51.] Such interference would, of course, be possible whether the employer's civil suit were groundless or not. However, this problem can be addressed without the need for a remedy as drastic as a Board order directing an employer to dismiss his state lawsuit. In appropriate circumstances, for example, the trial court may impose limitations on an employer's discovery efforts. See 16 Ariz. Rev. Stat. Ann., R. Civ. P. 26(c) (1973). Furthermore, in Arizona, the party dissatisfied with such limitations may obtain immediate appellate review by means of a "special action." Such interlocutory appeals are appropriate when a lower court determination is "arbitrary and capricious or an abuse of discretion" or when a court exceeds or threatens to exceed its jurisdiction or legal authority. 17A Ariz. Rev. Stat. Ann., R. Proc. for Special Actions, Rule 3 (1973). It is well established in Arizona that discovery rulings are appropriate for review in special actions. *See, e.g., Ingalls v. Superior Court*, 117 Ariz. 448, 449, 573 P.2d 522, 523 (Ct. App. 1977); *Southern Pacific Transportation Co. v. Veliz*, 117 Ariz. 199, 200, 571 P.2d 696, 697 (Ct. App. 1977).[22]

---

[22]Interlocutory review procedures equivalent to those found in Arizona are also available in other states for discovery disputes. *See, e.g., Assured Investors Life Ins. Co. v. National Union Assocs.*, 362 So. 2d 228 (Ala. 1978); *Daly v. Superior Court*, 19 Cal. 3d 132, 560 P.2d 1193, 137 Cal. Rptr. 14 (1977) (*en*

Additional judicial protection against inappropriate employer discovery may be sought by the NLRB itself, under Section 10(j) of the Act, 29 U.S.C. § 160(j). That statutory provision authorizes the Board, upon issuance of an unfair labor practice complaint, to petition the Federal District Court for "appropriate temporary relief or restraining order." Section 10(j) injunctions are sought by the Board with some frequency,[23] and their objective is often to enjoin an employer from coercing or interrogating his employees. *See, e.g., Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967); *Zipp v. Shenanigans*, 92 Lab. Cas. (CCH) ¶12,921 (C.D. Ill. 1980).

Although the Board should not be permitted to enjoin *all* employer discovery in a libel case against employees, the Board may request a Section 10(j) injunction against particular objectionable inquiries. For example, in the present case, instead of seeking to utilize Section 10(j) to obtain dismissal of the Restaurant's entire lawsuit, the Board might have sought a carefully drawn and specific order from the District Court limiting the scope of the Restaurant's discovery to the extent that it would constitute unlawful interrogation under the Act or would interfere with the pending Board hearing on the Helton discharge.[24] Such an order, if deemed appropriate by the District Court, would have protected the Board's interests, and those of the employee defendants, without prohibiting the Restaurant from conducting its libel action. In short, a more appropriate accommodation of the interests of the employer and of the Board could have been sought below. More significantly, however, as we will

---

banc); *Mayer v. District Court*, 198 Colo. 199, 597 P.2d 577 (1979); *Muck v. Claflin*, 197 Kan. 594, 419 P.2d 1017 (1966); *Barker v. Dunham*, 551 S.W. 2d 41 (Tex. 1977). The employee defendants in the Restaurant's civil suit did seek a protective order limiting discovery into their organizational activities. [Jt. App. 23-31.] If they believed that the order subsequently issued by the trial judge was inadequate, they could have utilized the special action procedure to obtain immediate appellate review, but they did not do so.

[23]In fiscal year 1980, the Board filed 50 District Court lawsuits seeking relief under Section 10(j). See 45 NLRB Ann. Rep. 291 (FY 1980). The prior year, the Board had filed 62 such suits. See 44 NLRB Ann. Rep. 315 (FY 1979).

[24]See footnote 19 *supra* and footnote 29 *infra*.

demonstrate, there was nothing improper about the scope or manner of the discovery conducted by the Restaurant.

C. The Prosecution Of The Restaurant's State Court Action, Including The Taking of Deposition Testimony, Did Not Constitute An Unfair Labor Practice.

The Restaurant not only *filed* a civil lawsuit against the demonstrators, it also *prosecuted* that suit, including taking the depositions of several of the demonstrators in preparation for a hearing on its motion for a preliminary injunction. The deposition questions posed by the Restaurant's counsel were relevant to the state court action. They were directed at (a) the unlawful aspects of the demonstrations, such as mass picketing, interference with traffic, and obstruction of customer access, and (b) the truth or falsity of the allegedly libelous statements on the leaflet, including the statement that Ruth Helton was discharged for union activity. The NLRB held that the Restaurant violated Sections 8(a)(1) and (4) of the Act, 29 U.S.C. §§ 158(a)(1), (4), by "threatening to depose, and by deposing the defendants in the State of Arizona civil proceedings. . . ." [Pet. App. A-52.] The Ninth Circuit did not consider the propriety of the depositions alone, because it found that "filing and conducting the libel suit was an unfair labor practice." [Pet. App. A-12 n.2.]

The Board held that the Restaurant's discovery violated the principles established in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), because it provided "advance knowledge of the substance of the General Counsel's case" on the Helton discharge. [Pet. App. A-49.] In *Robbins Tire*, the employer sought to use the provisions of the Freedom of Information Act ["FOIA"], 5 U.S.C. § 552 (1976), to obtain pre-hearing discovery of witness statements given to the Board. The Court held the statements exempt from mandatory disclosure because their production would interfere with enforcement proceedings. 437 U.S. at 239. Any extension of the *Robbins Tire* decision to the facts of this case is wholly unwarranted. *Robbins Tire* involved a question of specific statutory construction — the FOIA is not involved here. Moreover, *Robbins Tire* involved an effort by counsel to discover written witness statements submitted *to the Board* during its administrative investigation — no such effort was made here. [Jt. App. 67-68.] *See Baldridge v. Shapiro*, 71 L.

Ed. 2d 199, 212 (Feb. 24, 1982) (confidential census data, unavailable under FOIA, also unavailable in court discovery).

To the extent that *Robbins Tire* does require an accommodation between the state's interest in preserving the peace and the NLRB's interest in preserving the confidentiality of its investigation, we submit that such an accommodation was reached in this case. In allowing discovery in preparation for the hearing on the preliminary injunction motion, the state judge carefully limited the scope of interrogation: She stated that the Restaurant "may not inquire as to what statements were made to NLRB investigators . . . or who made the statements."[25] [Jt. App. 40.] The Restaurant complied with that limitation. [*Id.* at 68.] Thus, without interfering with the Board's preparation for the imminent unfair labor practice hearing, the employer was allowed to prepare properly for an imminent *judicial* hearing.[26]

Counsel for the Restaurant asked the deponents, all of whom

---

[25]The ALJ noted that the Restaurant's counsel had argued to the state court that the Restaurant was entitled to ask "why [Ruth Helton] made the statements to a *public agency* as opposed to some other forum." [Pet. App. A-37; emphasis added.] The argument, as similarly reported in the transcript of the proceedings on the motion for a protective order [Jt. App. 38], was erroneously transcribed. As was made clear by the context of the statement, particularly the preceding paragraph, the Restaurant was asserting a right to inquire into statements made *in the public streets*, not to a public agency. [*Id.*] The Restaurant's counsel never sought to inquire into statements made by Helton or by anyone else to the Board, and Helton's counsel conceded that fact at trial. [*Id.* at 68.]

[26]Some of the responses obtained in the depositions may have been pertinent to the Board proceeding on Helton's discharge, but the important fact is that they were clearly relevant to the state proceeding. We recognize that discovery may be denied when its purpose "is to gather information for use in proceedings other than the pending suit." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978). However, *Sanders* is distinguishable because the discovery requested there was *not* relevant to the issues in that case. *Id.* at 352-53. Furthermore, the discovery sword cuts both ways: counsel for the defendants in the Restaurant's civil action also deposed several management officials. [Jt. App. 65-66.] Some of his questions focused on their knowledge of Helton's union activities, an issue relevant to both the pending Board proceeding and the pending libel action. [*Id.* at 66.] Moreover, at least one of those depositions was used in an attempt to impeach a witness' subsequent NLRB testimony. [*Id.* at 119-24.]

had participated in the public demonstrations, for information about their picketing and their interference with Restaurant operations, and, to a lesser extent, for the facts which supported the accusations in their leaflet, including the statement that Ruth Helton had been fired for suggesting that waitresses at the Restaurant form a union. That such a statement, when uttered publicly, may be the basis for a libel suit was established in *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977).[27] That one may take discovery necessary to *prove* the libel is merely a logical extension of that holding. This Court's ruling in *Linn* imposes a malice test that requires proof of the publisher's state of mind. Denying the plaintiff the discovery tools necessary to carry his burden of proof would be in direct conflict with that case. An analogous situation confronted the Court in *Herbert v. Lando*, 441 U.S. 153 (1979), where the Court held that the constitutional freedoms of speech and press could not be used in a defamation suit to immunize the defendant television producer from discovery into his state of mind and into the editorial process:

> In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some sub-

---

[27]A false public accusation that a named individual has committed an unlawful act is generally actionable as libel. *See Broking v. Phoenix Newspapers, Inc.*, 76 Ariz. 334, 337, 264 P.2d 413, 415 (1953).

> stance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity." *New York Times Co. v. Sullivan*, 376 U.S., at 285-286.

441 U.S. at 170. If the Constitution is an insufficient shield from relevant discovery in a libel case, then, *a fortiori*, the mere filing of an unfair labor practice charge should not have provided Ruth Helton with a shield from such discovery.

III. THE ANTI-INJUNCTION ACT BARS THE NLRB FROM ENJOINING CIVIL ACTIONS IN STATE COURTS UNDER THE CIRCUMSTANCES OF THIS CASE.

In 1793, Congress enacted a statute which provided that no "writ of injunction be granted [by a federal court] to stay proceedings in any court of a state. . . ." Act of March 2, 1793; 1 Stat. 335. The rationale behind the statute was the need to preserve "the essentially federal nature of our national government," and the desire to prevent needless friction between the state and federal court systems by clearly delineating the proper boundaries within which each system may function. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285-86 (1970). *See also Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 132 (1941):

> Regardless of the various influences which shaped the [Anti-Injunction Act], the purpose and direction underlying the provision are manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court.

The present version of the 1793 statute was enacted in 1948 as Section 2283 of Title 28 of the United States Code. As the statute currently reads, a federal court may not grant an injunction against state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." In *Atlantic Coast Line Railroad*, this Court emphasized the need to construe these exceptions narrowly:

> [W]e therefore . . . hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction.

398 U.S. at 287. In reaching this conclusion, the Court expressly relied upon the constitutional principle that the states had surrendered only a part of their sovereignty to the federal government. U.S. Const. amend. X. One of the powers reserved by the states was the power to maintain a separate, independent judicial system, free to act unless restrained by the federal Constitution, laws or treaties. 398 U.S. at 285. *Atlantic Coast Line Railroad* involved litigation between two private parties, but the legal principles established therein remain basically intact when it is a governmental agency that seeks or issues the injunction against state judicial proceedings.[28] Thus, other cases, involving review of NLRB injunctions, demonstrate the narrowness of the exceptions to Section 2283.

In *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), for example, an employer had obtained a state court injunction and had filed an unfair labor practice charge against a union, both based upon the same conduct. The Court held that the Board had authority to obtain a District Court injunction against the state proceedings under the exception to Section 2283 for actions "in aid of its jurisdiction." In allowing that injunction, the Court ruled that where a federal agency has "exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right." *Id.* at 504-05.

Later, in *NLRB v. Nash-Finch Co.*, 404 U.S. 38 (1971), this Court, in a 5-2 decision, determined that an implied exception to the broad rule of non-intervention established by Section 2283 also

---

[28]Although it was the NLRB that issued the order restraining the Restaurant from proceeding with its state court suit [Pet. App. A-54], that order was only effective when enforced by the Federal Court of Appeals.

existed where the NLRB had acted to preserve its own preemptive jurisdiction. In *Nash-Finch*, the employer had obtained a state court injunction limiting union picketing. The Board then filed suit in Federal District Court, seeking to restrain enforcement of the state court injunction on the ground that it regulated conduct which was governed exclusively by the NLRA.[29] On review, this Court found that the Board's action did not come within the Section 2283 exception for matters "necessary in aid of its jurisdiction," since the Board had not sought to restrain specific activities which were already the subject of a Board complaint. *Id.* at 142. Nevertheless, the Court did affirm the Board's action, holding that the NLRB has implied authority in spite of Section 2283 "to enjoin state action where its federal power pre-empts the field." *Id.* at 144.[30] Such an

---

[29]It is significant that the order sought from the District Court by the Board in *Nash-Finch* was not directed at the entire state proceeding instituted by the employer but only at the objectionable aspects of the injunction he had obtained. The Supreme Court noted that the injunction was broadly aimed at peaceful, protected handbilling, picketing and even discussion, and had been issued under a dubious state statute. 404 U.S. at 140-41. The decision of the Eighth Circuit below noted that the Board had sought:

> . . . to restrain the Company from enforcing or attempting to enforce *those parts* of the state court temporary injunction alleged to violate Article VI, Clause 2 (The Supremacy Clause) of the Constitution of the United States because it conflicted with the National Labor Relations Act, and *other parts* of the injunction claimed to restrain peaceful picketing and to be within the area arguably preempted by the National Labor Relations Act.

NLRB v. Nash-Finch Co., 434 F.2d 971, 974 (8th Cir. 1970) (emphasis added).

[30]The dissenters argued for a more restrictive view of Section 2283:

> In light of the congressional disinclination to authorize anything more than extremely limited interferences with state court proceedings by federal courts, and in view of this Court's reluctance to approve such interference by way of the equitable powers of federal courts, *Younger v. Harris*, 401 U.S. 37, 43-45 (1971); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970), implicit exceptions from § 2283 are at best suspect.

404 U.S. at 151 (White, J., dissenting, joined by Brennan, J.). *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975) (federal courts asked to enjoin state proceedings "should abide by standards of restraint that go well beyond those of private equity jurisprudence").

injunction was not appropriate in the case presently at bar, however, because "state jurisdiction to enforce its laws prohibiting violence, defamation, the intentional infliction of emotional distress, or obstruction of access to property is not pre-empted by the NLRA." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 204 (1978) (footnotes omitted).[31]

In the present case, the Ninth Circuit held that the Board's cease-and-desist order requiring the Restaurant to withdraw its civil suit was not barred by Section 2283 because the anti-injunction statute "does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction." [Pet. App. A-12.] Thus the Ninth Circuit implicitly found that the second of the three exceptions to the Anti-Injunction Act applied here — that is, that the Board could obtain an injunction against the Restaurant's lawsuit on the ground that the injunction was "necessary in aid of its jurisdiction." We submit, however, that the Board had no jurisdiction to aid by enjoining the Restaurant's civil suit. Although the Court relied upon *Capital Service* and *Nash-Finch*, the subject matter of the state lawsuit — libel, trespass, and improper interference with business — was neither pending before the Board nor subject to its jurisdiction. The only dispute between the parties that was then pending before the Board involved the discharge of Ruth Helton. But the pendency of those charges did not give the demonstrators license to engage in tortious conduct on the streets of Phoenix. *See Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *May Department Stores Co. v. Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976).

---

[31]Under *Nash-Finch* and *Capital Service*, the Board may have authority to restrain state court actions which interfere with its proceedings in violation of Section 8(a)(4) of the Act. The Ninth Circuit found that management's threats on the first day of picketing demonstrated a retaliatory motivation for the suit in violation of that section. [Pet. App. A-11 to A-12.] Apparently overlooked by the court, however, was the Board's own finding that there was no evidence that the threats violated Section 8(a)(4). [*Id.* at A-14 n.2] This holding by the Board obviously undermines any conclusion that the motivation for the civil suit, as purportedly revealed by those threats, was to penalize employees for participating in proceedings before the Board.

If the Board was correct in asserting that some aspects of the Restaurant's discovery in the civil suit interfered with the pending Board hearing on the Helton discharge, the agency did have the power to obtain limited injunctive relief "in aid of its jurisdiction" under Section 10(j), 29 U.S.C. § 160(j). But the Board did not have the power to obtain an order requiring withdrawal of the *entire* state court proceeding. The Ninth Circuit erred in holding that the Board has some general power to intervene in labor disputes and to enjoin state court litigation "whether or not the state court's jurisdiction is technically preempted." [Pet. App. A-13.] *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 152 (1971) (White, J., dissenting) ("The Board has no roving, unqualified power to prevent unfair labor practices. . . ."). The NLRB does not have blanket authority to intervene in the relationship between employer and employee whenever it deems that one side has obtained an advantage over the other or is applying painful economic leverage in the relationship. The Board may intervene only when its statutory mandates require that it control the situation. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). If the Restaurant's civil action was groundless, or was otherwise improper, appropriate controls were within the jurisdiction of the state court, not the NLRB.

CONCLUSION

For all the foregoing reasons, Petitioner, Bill Johnson's Restaurants, Inc., respectfully requests that the decision of the Ninth Circuit with respect to the issues raised herein be reversed, and that the case be remanded to that court with instructions to deny enforcement of the Board's order insofar as it relates to the civil lawsuit filed by Petitioner in Maricopa County Superior Court (No. C375470).

Respectfully submitted this 2nd day of December, 1982.

LAWRENCE ALLEN KATZ
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999
Counsel for Petitioner

Of counsel:
N. GREGORY SMITH
SUSAN GAYLORD GALE

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, Amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTES

28 U.S.C. § 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

29 U.S.C. § 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. . . .

29 U.S.C. § 160. Prevention of unfair labor practices.

* * * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate

temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

TRANSCRIPT OF PROCEEDINGS in *Price v. Bill Johnson's Restaurants, Inc.*, Civ. No. 78-830, D. Ariz., Nov. 1, 1978, pp. 37–38.

[Caption deleted]

THE COURT: As I see it, the Court is confronted with two propositions. Number one, is the filing of a State court action for libel as is the case here, an interference with the functions of the National Labor Relations Board under the National Labor Relations Act, and therefor [sic] prohibited?

I will follow the 9th Circuit in the case cited in 577 F.2d, 100, at 103 to the effect that filing a civil action is not a violation of the National Labor Relations Act, in and of itself.

At the same time, the Court is aware of the fact that no employer or an employee can interfere with the operation of the National Labor Relations Board.

Now, those are two fundamental issues. Moreover, this Court is cognizant of the doctrine of abstention between federal and state authority. And I'm not about to enjoin anybody from bringing an action in the State Court of Arizona, unless it shows to me that it is wholly outside of the State jurisdiction, or that it's in direct interference with the Government of the United States. I don't find that here.

I will issue an Order enjoining the Respondent here to not interfere with the National Labor Relations Board investigations and hearings. If you want that. But I'm certainly not going to enjoin an employer from bringing an action which he believes is a meritorious action for libel.

Now, if that has any chilling effect — and it may have a chilling effect — but the only chilling effect this Court can see is that it may curb the tempers of a few people to the extent that they better be careful to state the truth with respect to what they may assert to be public. And if they fail to state the truth in statements to the public, then in that event, they may be called to account in a court of law.

Now you two gentlemen can get together and figure out an Order not inconsistent with what the Court stated.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (As Amended), issued in Civ. No. 78–830, D. Ariz., Jan. 22, 1979.

[Caption deleted]

Milo V. Price, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, having filed a Petition for an injunction pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), and a hearing having been held on November 1, 1978 pursuant to this Court's Order that Respondent show cause why said injunction should not issue, and the Court having fully considered the pleadings, the affidavits, and the legal memoranda filed herein and having heard oral argument of counsel, now therefore,

IT IS HEREBY ORDERED, denying Petitioner's request for an injunction restraining the Respondent from prosecuting the lawsuit filed by it in the Superior Court of the State of Arizona, in and for the County of Maricopa and bearing the title and number Case No. C375470, *Bill Johnson's Restaurants, Inc., et al. v. Helton et al.*, and

IT IS HEREBY ORDERED, denying Petitioner's request for an injunction restraining Respondent from interfering with the National Labor Relations Board's processes, from impeding employee resort to the Board, from interrogating, threatening, or discriminating against employees or former employees because of their protected activities or participation in Board matters, and from restraining or coercing employees in the exercise of their rights as provided in the National Labor Relations Act, and

IT IS FURTHER ORDERED, recognizing that the National Labor Relations Act prohibits employers from engaging in the acts or conduct described in the preceding paragraph, that the National Labor Relations Board may reapply for all just and proper injunctive relief restraining such acts or conduct by Respondent upon a suitable factual showing that such acts or conduct have occurred or are threatened.

The findings of fact and conclusions of law upon which this Order is based are set forth below.

I. FINDINGS OF FACT

1. The Petitioner is the Regional Director of the Twenty-Eighth Region of the National Labor Relations Board ("NLRB"), an agency of the United States.

2. The Respondent, Bill Johnson's Restaurants, Inc., is now, and has been at all times material herein, a corporation duly organized and existing under the laws of the State of Arizona, operating restaurants in Phoenix and Mesa, Arizona, including one at 3757 East Van Buren Street, Phoenix, Arizona.

3. The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act (hereinafter "the Act"), 29 U.S.C. § 151 *et seq*.

4. On August 8, 1978, Respondent discharged Myrland R. Helton from her employment as a waitress at Respondent's restaurant located at 3757 East Van Buren Street (hereinafter "the Restaurant"). The following day Ms. Helton filed a charge with the NLRB claiming that she had been discharged "because of "her union and/or other protected concerted activities" in violation of the Act. On September 20, the NLRB issued a complaint based on Ms. Helton's charge, alleging that her discharge constituted an unfair labor practice under Sections 8(a)(1) and (3) of the Act.

5. On the morning of September 20, 1978, Ms. Helton, together with four supporters who had left their jobs with Respondent, began picketing in front of the Restaurant. At one point during the picketing, while the demonstrators were standing in the entrance to the Restaurant parking lot talking to the passengers in a car entering the premises, Sherry Sturgeon, one of Respondent's managers, came out of the Restaurant and ordered the picketers away from the driveway. Angry words were exchanged between the parties. There is no evidence that this incident was observed by any of the Restaurant employees. Although the picketing continued for several more hours on September 20, and for several days thereafter, there is no evidence that there were other confrontations between Ms. Sturgeon and the demonstrators.

6. Picketing also took place on September 21 and 22, and there is evidence that on occasion the picketers interfered with customer exit and entry, argued with Respondent's customers and employees, and were joined in their efforts by additional persons.

7. On September 22, 1978, the third day of picketing, Ms. Helton and her supporters passed out leaflets to customers of the Respondent and to passersby. The leaflets informed the public that the NLRB had issued a complaint against the Restaurant. The leaflets also contained assertions that Ms. Helton had been discharged because of her union activities and that waitresses at the Restaurant had been subjected to "unwarranted sexual advances" and compelled to use a "filthy restroom."

8. On September 25, 1978 Respondent filed a Complaint against Ms. Helton and the other demonstrators in the Superior Court of the State of Arizona, in and for the County of Maricopa. The Complaint prayed for injunctive relief and damages as a result of the alleged unlawful activities of the demonstrators, including wrongful interference with customers and with business operations and the publication of defamatory statements in the leaflets. Among the statements which the Restaurant sought to enjoin were those which "misrepresent[ed] the nature of substance of the matter now pending before the National Labor Relations Board as Case No. 28-CA-4970."

9. The suit was assigned to the Honorable Marilyn A. Riddel, Judge of the Maricopa County Superior Court. On September 25, 1978, Judge Riddel issued a temporary restraining order limiting the demonstrators to four persons at any one of Respondent's restaurants and prohibiting violence, threats of violence, trespass and interference with ingress and egress.

10. On the following day, September 26, 1978, Ms. Helton filed a second charge with the NLRB, alleging that Respondent's lawsuit violated the Act because it "coerced and restrained" employees in the exercise of their rights and was instituted in order to "harass" employees engaged in union activities and "to force them to curtail such activities." On October 3, 1978 this charge was amended to allege also that the lawsuit was instituted in retaliation for the participation of Ms. Helton and her supporters in the previous NLRB proceedings.

11. On October 3, 1978, Don Kalfas, one of the owner-managers of the Restaurant, had a telephone conversation with Sandra Lambertus, a former waitress at the Restaurant whom he had known for many years. During the conversation, on advice of coun-

sel, Mr. Kalfas described to Ms. Lambertus the status of matters before the NLRB and asked her if she was willing to discuss Ms. Helton's charges with the attorney preparing Respondent's defense. When Ms. Lambertus indicated that she did not want to get involved, Mr. Kalfas did not pursue the matter further. He did not ask whether Ms. Lambertus had given a statement to the NLRB, and he did not otherwise inquire into the NLRB investigation. At the end of the conversation, Mr. Kalfas thanked her and wished her and her husband good luck in their new business.

12. On October 23, 1978, the NLRB issued a complaint based on Ms. Helton's second charge. The complaint alleged that Ms. Sturgeon's argument with the picketers on September 20, Mr. Kalfas' phone call to Ms. Lambertus on October 3, and the prosecution of the Respondent's state court lawsuit violated Section 8(a)(1) of the Act by interfering with, restraining and coercing employees in the exercise of their rights under the Act, and violated Section 8(a)(4) of the Act by discriminating against employees for filing charges with or giving testimony to the NLRB.

13. On October 27, 1978, the NLRB filed the instant petition pursuant to Section 10(j) of the Act seeking injunctive relief against Respondent pending final resolution of Ms. Helton's charges.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter under Section 10(j) of the Act, 29 U.S.C. § 160(j).

2. A prerequisite to the granting of the interlocutory injunctive relief sought by the Petitioner under Section 10(j) is a finding by the Court that the NLRB has reasonable cause to believe that the Respondent has committed an unfair labor practice in violation of the Act. *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 36 (2nd Cir. 1975); *Angle v. Sacks*, 382 F.2d 655, 658 (10th Cir. 1967); *Panello v. International Union, UMW*, 88 F. Supp 935, 938 (D.D.C. 1950).

3. In meeting this test, the NLRB need not prove that the unfair labor practice was in fact committed, but it must establish that the legal theories it has applied to the available facts are not insubstantial or frivolous. *Boire v. International Bhd. of Teamsters,*

479 F.2d 778, 796 (5th Cir. 1973); *Schauffler v. Local 1291, ILA*, 292 F.2d 182, 187-88 (3d Cir. 1961).

4. This Court concludes, as a matter of law, that the NLRB has not shown reasonable cause to believe that Respondent has committed an unfair labor practice. The two incidents offered by the Petitioner as evidence that Respondent interfered with, restrained or coerced its employees in the exercise of their rights under the Act — Sherry Sturgeon's one confrontation with the picketers on September 20, and Don Kalfas' single telephone call to Sandra Lambertus on October 3 — cannot fairly be considered coercive within the meaning of the Act. In any event, even if these two incidents were coercive, they were isolated and insignificant and, as such, constitute insufficient evidence to warrant an NLRB finding that an unfair labor practice has occurred. *NLRB v. Grunwald-Marx, Inc.*, 290 F.2d 210 (9th Cir. 1961); *Dierks Forests, Inc. v. NLRB*, 385 F.2d 48, 51 (8th Cir. 1967); *Caribe General Electric, Inc. v. NLRB*, 357 F.2d 664, 666 (1st Cir. 1966); *NLRB v. Mississippi Prods., Inc.*, 213 F.2d 670, 674 (5th Cir. 1954).

5. The Court further finds that, based on the evidence, the Petitioner had no reasonable cause to believe that Respondent filed its lawsuit in the state court for a coercive or discriminatory purpose within the meaning of the Act, or that in so doing Respondent intended to interfere with the NLRB processes. In any event, the filing of a civil suit by an employer against his employees does not constitute an unfair labor practice, despite the incidental coercive effect upon employees' statutory rights. *Bergman v. NLRB*, 577 F.2d 100, 103 (9th Cir. 1978); *Clyde Taylor Co.*, 127 N.L.R.B. 103 (1960).

6. An exception to this general rule is made when the suit seeks an unlawful objective, as, for example, when a union sues to enforce an unlawful contract. *Booster Lodge 405, IAM v. NLRB*, 412 U.S. 84 (1973); *International Org. of Masters, Mates & Pilots v. NLRB*, 575 F.2d 896 (D.C. Cir. 1978); *United Stanford Employees, Local 680*, 232 N.L.R.B. No. 49 (1977). No such unlawful objective was sought in the instant case.

7. On its face, the Respondent's lawsuit does have lawful objectives. With respect to the first cause of action, it is well established that an employer has the right to seek an injunction and

damages against trespass, mass and non-peaceful picketing, and interference with customer entry and with business operations. *UAW v. Wisconsin Employment Relations Board*, 351 U.S. 266, 274-75 (1956); *Alesna v. Rice*, 74 F. Supp. 865 (Haw. 1947), *aff'd*, 172 F.2d 176 (9th Cir.), *cert. denied*, 338 U.S. 814 (1949).

8. With respect to the Respondent's cause of action based on libel, it is sufficient to note that the NLRB itself has ruled that an employer's slander suit against an employee does not constitute an unfair labor practice. *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977). Furthermore, the U.S. Supreme Court has held that state court jurisdiction over libel claims is not preempted by the National Labor Relations Act when such claims arise in the context of a labor dispute. *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977); *Linn v. United Plant General* [sic] *Workers*, 383 U.S. 53 (1966).

9. Although Respondent's discovery in the state court suit elicited some responses which may have relevance to the proceedings before the Board, the discovery was also relevant to the state litigation and thus proper. *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973); *Deering Milliken Research Corp. v. Leesona Corp.*, 27 F.R.D. 440, 441 (E.D.N.Y. 1961); 4 Moore's Federal Practice ¶26.54 at p. 26–105 (2d ed. 1976). The state court judge ordered Respondent not to engage in discovery regarding statements made by witnesses to the NLRB, and the Respondent complied with that order. The case is thus distinguishable from *NLRB v. Robbins Tire & Rubber Co.*, 434 U.S. 1061 (1978).

10. Since the NLRB had no reasonable cause to believe that Respondent committed an unfair labor practice by filing its lawsuit, the granting of an injunction prohibiting the Respondent from prosecuting the suit would be improper under the "just and proper" criteria of Section 10(j) of the Act.

DATED: January 22, 1979

/s/ Walter E. Craig

United States District Judge

A copy of the foregoing hand delivered
this 9th day of January, 1979, to:

Jon Pettibone, Esq.
Field Attorney
National Labor Relations Board
3030 North Central
P.O. Box 3069
Phoenix, Arizona 85067

Lawrence Allen Katz

LAWRENCE ALLEN KATZ,
Attorney for Respondent

ORDER issued in Bill Johnson's Restaurants, Inc. v. Helton, *et. al.*, C375470, Superior Court, Maricopa County, Ariz., Mar. 15, 1979

[Caption deleted]

Having been under advisement and the Court having reviewed the written and oral arguments of counsel and the authorities cited in light of the record to date,

IT IS ORDERED dismissing the abuse of process count in the counterclaim and leaving the libel claim for trial.

FURTHER ORDERED granting the Defendants' Motion for Summary Judgment as to the business interference claim of the complaint but leaving the business disparagement (libel) count for trial.

QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(1) and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (4), by filing a civil suit for libel and other alleged injury to its business in order to retaliate against its employees for filing unfair labor practice charges with the Board and for engaging in other activities protected by the Act.

2. Whether the Anti-Injunction Act, 28 U.S.C. 2283, prevents the Board from ordering petitioner to dismiss its civil suit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	13
Argument:	
I. The Board properly concluded that petitioner violated the National Labor Relations Act when it brought a civil suit in order to retaliate against its employees for filing unfair labor practice charges with the Board and for engaging in other activities protected by the Act	16
A. The Board has concluded that filing of a civil suit normally will not violate the Act, but has recognized an exception for cases in which a suit is brought in order to retaliate against employees for engaging in activities protected by the Act	19
B. The Board's conclusion that the filing of a civil suit for the purpose of retaliating against employees for exercise of protected rights constitutes an unfair labor practice reflects an appropriate weighing of the relevant interests	23
1. In order to provide adequate protection for employee rights under the Act, the Board must be able to conclude that filing of a civil suit for the purpose of retaliation for the exercise of protected rights constitutes an unfair labor practice	24
2. The Board's conclusion that the filing of a civil suit for a retaliatory purpose constitutes an unfair labor practice does not interfere in any significant way with the interest of states in adjudication of common law tort claims and protection of the state judicial process from abuse	30

Argument—Continued Page

3. The Board's policy with respect to retaliatory civil suits is similar to principles the courts have applied in other areas of the law 31

C. The Board properly concluded in this case that petitioner filed its civil suit for a retaliatory purpose and thereby committed an unfair labor practice 35

D. Decisions of this Court concerning preemption do not preclude the Board from finding that filing of a civil suit in bad faith constitutes an unfair labor practice 39

II. Section 2283 (28 U.S.C.) does not preclude the Board from ordering petitioner to dismiss its civil suit 43

Conclusion 47

TABLE OF AUTHORITIES

Cases:

Airport Limousine Service, Inc., 231 N.L.R.B. 932.. 20
Alexander v. *Unification Church of America*, 634 F.2d 673 34
Amalgamated Clothing Workers v. *Richman Brothers Co.*, 348 U.S. 511 43
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U.S. 261 45
American Bakery & Confectionery Workers, 128 N.L.R.B. 937 20
American Federation of State, County & Municipal Employees, 262 N.L.R.B. No. 121 (July 15, 1982) 20
Angle v. *NLRB*, 683 F.2d 1296 ..... 22, 38
Associated General Contractors v. *NLRB*, 637 F.2d 556 20
Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 43
Bergman v. *NLRB*, 577 F.2d 100 21

Cases—Continued	Page
Booster Lodge No. 405, International Association of Machinists & Aerospace Workers, 185 N.L.R.B. 380, enforced, 459 F.2d 1143, aff'd, 412 U.S. 84	23, 44
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508	15, 31
Capital Service, Inc. v. *NLRB*, 347 U.S. 501	45
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389	32
Clayton v. *International Union*, 451 U.S. 679	26
Clipper Exxpress v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252	32, 33
Clyde Taylor Co., 127 N.L.R.B. 103	19
DC International, Inc., 162 N.L.R.B. 1383, enforced in part, 385 F.2d 215	20
Dombrowski v. *Pfister*, 380 U.S. 479	15, 33
Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127	31
Farmer v. *United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290	40
Fashion Fair, Inc., 159 N.L.R.B. 1435	20
George A. Angle, 242 N.L.R.B. 744, enforced, 683 F.2d 1296	21, 22, 38
Grip-Pak, Inc. v. *Illinois Tool Works, Inc.*, 694 F.2d 466	33, 34
Huffman v. *Pursue, Ltd.*, 420 U.S. 592	33
International Organization of Masters, Mates and Pilots, 224 N.L.R.B. 1626, aff'd, 575 F.2d 896	20, 21
Leiter Minerals, Inc. v. *United States*, 352 U.S. 220	43
Linn v. *United Plant Guard Workers, Local 114*, 383 U.S. 53	15-16, 39, 40
Local 259, United Automobile Workers, 221 N.L.R.B. 656	20
Lodges 743 and 1746, International Association of Machinists & Aerospace Workers v. *United Aircraft Corp.*, 534 F.2d 422, cert. denied, 429 U.S. 825	21
Los Angeles Building & Construction Trades Council, 217 N.L.R.B. 946	20

Cases—Continued Page

Mitchum v. *Foster*, 407 U.S. 225 ..... 43, 46
Nash v. *Florida Industrial Commission*, 389 U.S. 235 26
NLRB v. *C & C Plywood Corp.*, 385 U.S. 421 38
NLRB v. *Exchange Parts Co.*, 375 U.S. 405 17
NLRB v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 29
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 17
NLRB v. *Granite State Joint Board, Textile Workers Union, Local 1029*, 409 U.S. 213 ..... 23, 44
NLRB v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 17
NLRB v. *Nash-Finch Co.*, 404 U.S. 138 ..... 16, 43, 46
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 .. 28
NLRB v. *Scrivener*, 405 U.S. 117 ..... 17, 26
NLRB v. *Strong Roofing & Insulating Co.*, 393 U.S. 357 35
NLRB v. *Taber Instruments*, 421 F.2d 642 17
New Motor Vehicle Board v. *Orrin W. Fox Co.*, 439 U.S. 96 32
Otter Tail Power Co. v. *United States*, 410 U.S. 366 32
Peddie Buildings, 203 N.L.R.B. 265, enforcement denied, 498 F.2d 43 19
Power Systems, Inc., 239 N.L.R.B. 445, enforcement denied, 601 F.2d 936 ..... 11, 21, 22, 38
Power Systems, Inc. v. *NLRB*, 601 F.2d 936 ..... 22, 38
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 17
Retail Clerks Union Local 770, 218 N.L.R.B. 680 20
Ridgewood Management Co. v. *NLRB*, 410 F.2d 738 17
S.E. Nichols Marcy Corp., 229 N.L.R.B. 75 ..... 19, 20, 29
Sears, Roebuck & Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180 ..... 16, 41
Sheet Metal Workers' Union Local 355, 254 N.L.R.B. 773 21
Smith Steel Workers, 174 N.L.R.B. 235, enforced, 420 F.2d 1 20
Television Wisconsin, Inc., 224 N.L.R.B. 722 23
United Credit Bureau of America, Inc., 242 N.L.R.B. 921, enforced, 643 F.2d 1017, cert. denied, 454 U.S. 994 ..... 21, 22, 25, 27, 34, 38, 43, 45

Cases—Continued Page

United Credit Bureau of America, Inc. v. *NLRB*, 643 F.2d 1017, cert. denied, 454 U.S. 994 ..... 11, 22, 38
United Mine Workers v. *Pennington*, 381 U.S. 657 .. 31
United Stanford Employees, Local 680, 232 N.L.R.B. 326, enforced, 601 F.2d 980 23
Vendo Co. v. *Lektro-Vend Corp.*, 433 U.S. 623 32
Younger v. *Harris*, 401 U.S. 37 33

Statutes:

Freedom of Information Act, 5 U.S.C. 552(b)(7)(A) 28
National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*:
Section 7, 29 U.S.C. 157 ..... 16, 17, 19, 27, 43, 44
Section 8(a)(1), 29 U.S.C. 158(a)(1) 3, 7, 8, 13, 16, 17, 25, 36, 44, 45
Section 8(a)(3), 29 U.S.C. 158(a)(3) 3, 8
Section 8(a)(4), 29 U.S.C. 158(a)(4) 7, 8, 13, 16, 17, 25, 44, 45
Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 17
Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B) 20
Section 8(b)(4), 29 U.S.C. 158(b)(4) 20
Section 10(e), 29 U.S.C. 160(e) 46
Section 10(j), 29 U.S.C. 160(j) 7, 14, 27, 28
Sherman Act, 15 U.S.C. 1 ..... 14, 31
28 U.S.C. 2283 ..... 16, 43, 44
Ariz. Rev. Stat. Ann. § 12-341.01(C) (West 1982) 26

Miscellaneous:

Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L. Rev. 39 (1980) 32
Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80 (1977) 32
W. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 34
Restatement (Second) of Torts (1977) 34

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-13) [1] is reported at 660 F.2d 1335. The decision and order of the National Labor Relations Board (Pet. App. A-14 to A-57) are reported at 249 N.L.R.B. 155.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1981. A petition for rehearing was denied on March 2, 1982. The petition for writ of certiorari was filed on May 28, 1982, and was granted on October 18,

---

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari, "J.A." to the Joint Appendix filed in this Court, "Tr." to portions of the transcript of the hearing before the Administrative Law Judge that have not been reproduced in the Joint Appendix, and "GCX" and "RX" to exhibits introduced by the General Counsel and the Respondent (petitioner here), respectively, at that hearing.

1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. A-1 to A-2.

STATEMENT

1. a. Petitioner operates a restaurant in Phoenix, Arizona, known as "Bill Johnson's Big Apple East" ("the Restaurant"). On July 25, 1978,[2] Vice President Johnny Johnson, a member of the family that owns the Restaurant, held a meeting of employees to announce a new policy of strict enforcement of company rules. He warned that any waitress who violated his rules would never work again at any of his family's restaurants. Among other things, he added that he would make it "darn hard" for such a waitress to find work at any other restaurant; that the waitresses "didn't really mean anything" and could all be replaced in half an hour, regardless of their seniority; and that he could fire them if he didn't like the earrings they were wearing (Pet. App. A-3, A-22; Tr. 68-71, 160-161, 216, 217, 250-251, 320).

This speech angered and frightened the waitresses, who felt they were being treated "like peons" and that they might be fired at any moment. The waitresses discussed their concerns over the next few days. Several agreed with the suggestion of Ruth Helton, one of the most senior waitresses, that they should get a union to represent them, even though the management of the Restaurant had warned them at various times in the past that they could be fired just for mentioning the word "union." Helton and waitress Carla Scott decided to draw up a list of the waitresses' complaints about their working conditions and to show it to a lawyer acquaintance for advice on what action they could take. Several days after the

[2] All dates hereinafter are in 1978, unless otherwise indicated.

waitresses had begun their discussions, Supervisor Gay telephoned Helton at home and told her that she was discharged. When Helton asked why, Gay said it was because Johnny Johnson had not liked a question she had asked at the July 25 meeting,[3] and also because of her "attitude" (Pet. App. A-4, A-22 to A-23, A-28; Tr. 162, 72-74, 217, 90-91, 320-323, 66-67, 170-172, 286-289, 429-430, 155-156).

On August 9, Helton filed a charge with the National Labor Relations Board alleging that she had been discharged because of her union activity. On September 18, waitresses Nichols, Scott and Michaud walked out of the Restaurant without explanation. When they later returned to fill out tip reports, Manager Sherry Sturgeon, a member of the Johnson family, asked them why they had walked out. The waitresses said they had done so to protest Helton's discharge and the unfair treatment they had been receiving since the meeting. The waitresses did not say that they had quit their jobs, but Sturgeon told them to pick up their checks the following day (Pet. App. A-4 to A-5, A-31 to A-32; Tr. 323-327).

On September 20, the Board's General Counsel issued a complaint alleging that the Restaurant had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging Helton for her union activities. That same day, Helton and her husband John, waitress Cheryl Nichols and her husband Carl, waitresses Scott and Michaud, and former employee Debra Mackie began picketing the Restaurant. Their signs said that the Restaurant had been accused of unfair labor practices and asked the public to boycott the Restaurant.[4] The pickets walked along the sidewalk

---

[3] At the meeting, Helton had asked whether waitresses could sell customers a single pancake, rather than orders of two (Pet. App. A-4, A-24; Tr. 71-72, 162).

[4] Among other things, the picket signs read: Big Apple, small management; Big Apple rotten to its employees; Big Apple unfair to waitresses; Support your local waitresses; Boycott the Big Apple; and Big Apple prejudiced (J.A. 70, 106).

in front of the Restaurant and crossed two driveways leading to its parking lot, but they did not block access to the lot or to the Restaurant. At no time did the pickets number more than seven adults and two children. (Pet. App. A-5, A-32; J.A. 69-72, 112-116, 96, 106-107, 85-86, 4).

Shortly after the picketing began, manager Sturgeon confronted the pickets and took down their names. She said, "[y]ou might think you're funny, but I intend to have the last laugh. I will get even with you for what you're doing." She also said, "[y]ou're going to all pay for this," and she told Helton, "Ruth[,] I'll get even with you if it's the last thing I do." That afternoon, petitioner's President, Gene Johnson, telephoned waitress Nichols and asked to speak to her husband. Johnson asked Carl Nichols why he and his wife had been picketing the Restaurant. When Nichols said that they were protesting Helton's discharge, Johnson said that she would hate to see them lose the new home they had bought, and, twice during the conversation, stated that she would hate to see them "get hurt by all of this" (Pet. App. A-5, A-32 to A-34; J.A. 70-71, 82-84, 102-103, 87-90).

Picketing continued on Thursday and Friday, September 21 and 22. On September 22, the pickets distributed a leaflet that stated (Pet. App. A-5 to A-6, A-34 to A-35; J.A. 2):

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT * * * FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton has been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the

restaurant's management. Among the waitresses' complaints are the following:

- Eight hour shifts with no specified breaks.
- No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.
- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

b. On Monday, September 25, petitioner filed a civil complaint in state court against Helton and the other pickets. The complaint (J.A. 3-9) alleged that Helton and the others had engaged in mass picketing, harassed customers, blocked public access to the Restaurant, made statements indicative of a strike and boycott when in fact no such strike or boycott was in progress, and created a threat to public safety. The complaint also alleged that the pickets had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the [NLRB] and accusations that the Restaurant's waitresses had complained about 'unwarranted sexual advances' and about 'a filthy restroom for women employees * * * '" (*id.* at 4). The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the pickets from trespassing, mass picketing, violence, interfering with the Restaurant's business operations, and publishing false and misleading statements about the Restaurant and its management. At the time petitioner filed the complaint it also sought a temporary restraining order and filed a motion

to shorten the time for taking depositions (*id.* at 10-19). The depositions of Helton and her husband were set for September 27, and those of the other defendants for September 29 (Pet. App. A-6, A-35 to A-36).

A hearing on petitioner's motion for a temporary restraining order was scheduled for noon on September 25. About an hour before the hearing, Helton received a telephone call from fellow waitress Scott saying that she had just been called by Lawrence Katz, the Restaurant's attorney, and that she had to go to court at noon. Scott told Helton the matter involved "a TR something, [but] she didn't really know what it was and she didn't really know what was going on." A few minutes later, Katz called Helton, told her that a hearing was scheduled for noon, and read her the names of the other defendants in the suit, whom she recognized as those who had picketed in her support. She told Katz that he "shouldn't be scaring those girls like that," to which Katz responded, "[a]ren't you?" (Pet. App. A-36; J.A. 73-85, 80).

Only three of the pickets attended the hearing on petitioner's motion for a temporary restraining order. None of the three was represented by counsel. The court issued an order granting most of the relief requested, but refused to enjoin either the distribution of leaflets or picketing by small groups. The court set a hearing on the request for preliminary injunction for October 5 (Pet. App. A-6, A-36; J.A. 94-95, 54, 19-22).

On October 2, petitioner's attorneys began deposing Helton and the other defendants. They asked numerous questions regarding the nature and extent of Helton's union activities, the identities of other employees involved in such activities, and the extent of knowledge by supervisors of these activities.[5] Petitioner's attorneys sought

---

[5] The employees' attorney had filed a motion to preclude discovery of matters relevant to the pending unfair labor practice proceeding until after the Board hearing, since the Board's rules generally do not permit discovery. The state court ruled that, while petitioner's attorneys could not inquire into statements made to the

to discover evidence possessed by the defendants concerning petitioner's antiunion animus and information about defendants' compliance with various Restaurant rules (Pet. App. A-36 to A-37; J.A. 58-60; GCX 3(a) through 3(h)).

On the evening after Helton was deposed, petitioner's general manager Don Kalfus called former waitress Sandra Lambertus and said that Helton had mentioned Lambertus' name several times during her deposition and that he wanted to ask Lambertus some "honest questions" (Pet. App. A-38; Tr. 435, 453-454, 461). He said he knew the Restaurant needed to be "better organized" and that Helton had gotten a "bad deal" (Pet. App. A-38; Tr. 435-436, 461-462). He then asked whether Supervisor Gay was aware that the waitresses were trying to organize a union (Pet. App. A-38; Tr. 436, 454-455). Lambertus responded that Gay was aware, to which Kalfus responded, "[o]h, no," and said that he had been hoping she would tell him something different (Pet. App. A-38; Tr. 436, 454-455).

Meanwhile, on September 30, Helton had filed a second charge with the Board alleging that petitioner had filed its state court suit in retaliation for the defendants' protected, concerted activities, and because they had filed charges under the Act. On October 23, the General Counsel issued a complaint based on this charge, alleging that petitioner's lawsuit violated Section 8(a)(1) and (4) of the Act, 29 U.S.C. 158(a)(1) and (4).[6] An administrative law judge ("ALJ") consolidated the hearing on

---

Board's investigators, they could inquire as to "statements made publicly in Maricopa County, and the basis for those statements" (Pet. App. A-6, A-36 to A-37; J.A. 55-58, 22-31, 32-40).

[6] On October 27, the Board's Regional Director petitioned a federal district court, pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), for an order enjoining petitioner from maintaining its state court suit pending a final Board decision. The district court denied the Regional Director's request on November 1 (Pet. Br. App. C1 to C7). On November 13, the defendants in the state court suit filed countersuits against petitioner, alleging abuse of process, malicious

this complaint with the hearing on the unfair labor practice charges already pending.

2. The Board adopted the decision of the administrative law judge, concluding that petitioner had violated Section 8(a)(1) and (3) of the Act by discharging Helton because of her union activities, and that it had violated Section 8(a)(1) of the Act by threatening the pickets with reprisals (Pet. App. A-14 to A-57). The Board also found that petitioner had violated Section 8(a)(1) and (4) of the Act by initiating the lawsuit in order to punish Helton for filing the unfair labor practice charges, to punish Helton and the others for picketing the Restaurant, to discourage them from engaging in other protected, concerted activity, and to interfere with the pending Board proceeding (Pet. App. A-42, A-51 to A-52). Finally, the Board found that petitioner had violated Section 8(a)(1) and (4) of the Act by deposing the defendants, under circumstances the Board found to be coercive, concerning the subject matter of the pending unfair labor practice proceeding, for the purpose of circumventing the Board's discovery rules and gaining access to the General Counsel's case (Pet. App. A-14 to A-15, A-29, A-32 to A-52). The Board also found that petitioner had violated Section 8(a)(1) and (4) of the Act when its general manager questioned former employee Lambertus about a supervisor's knowledge of employee union activities (Pet. App. A-29 to A-30, A-38, A-51 to A-52).[7]

---

prosecution and libel. On March 15, 1979, the state court dismissed the counterclaim alleging abuse of process, granted the defendants' motion for summary judgment as to the business interference claim, and left the business disparagement (libel) count for trial (Pet. Br. App. D1).

[7] In addition, the Board found that petitioner had violated Section 8(a)(1) of the Act when, after Helton's discharge, a member of management twice asked a hostess whether Helton was having "any contact with any of the girls" and whether any of the other waitresses were talking about the union (Pet. App. A-29 to A-30, A-51).

In finding that petitioner's motive in filing the lawsuit was retaliatory, the ALJ relied on manager Sturgeon's threats to get even with Helton and the pickets and President Gene Johnson's threats to Carl and Cheryl Nichols that as a result of the picketing they might lose their new home or "get hurt by all this" (Pet. App. A-42). The ALJ also concluded that petitioner lacked a "reasonable basis" for filing the suit (*id.* at A-40). He found no basis for the allegations of the complaint that the pickets had blocked the sidewalk or harassed petitioner's customers and employees,[8] and he termed "pure folly" the allegation that the picket signs declared a boycott when no boycott was in progress[9] (*id.* at A-40 to A-41). The ALJ similarly found no basis for the allegations that the leaflet contained false, outrageous or malicious statements; he found that the leaflet contained no misrepresentations concerning the Board's proceedings, and that the record evidence in fact "establish[ed] the truthfulness of all six 'waitresses' complaints' listed in the leaflet"[10] (*id.* at A-41). The ALJ concluded (*id.* at A-42):

---

[8] Vice President Rudy Johnson, who was petitioner's observer during the picketing, admitted on cross examination that the pickets did not block access to the Restaurant (J.A. 113-116). The record contains no evidence of harassment of customers or employees.

[9] The state court complaint alleged that the pickets carried signs and made statements indicative of a strike and boycott "although no such boycott or strike was in progress" (Pet. App. A-40). In fact, the signs and leaflet made no mention of a strike, although several of the waitresses considered themselves on strike, and Vice President Rudy Johnson had heard one of them say so (J.A. 116). The picket signs specifically requested the public to boycott the Restaurant (J.A. 70, 106).

[10] The state court complaint alleged that the leaflet contained "misrepresentations of proceedings pending before the [NLRB]" and that it falsely stated that "waitresses had complained about 'unwarranted sexual advances' and about 'a filthy restroom for women employees * * *'" (Pet. App. A-40). The leaflet stated that a Board complaint had issued accusing the Restaurant of unfair labor

> [Petitioner's] lawsuit placed its employees on notice that if an employee files charges with the Board, or makes public a dispute with [petitioner], that employee is subjecting himself to the possibility of a lawsuit which will require immediate expense by having to hire private legal counsel to defend against the lawsuit and face the possibility of having to reimburse [petitioner] for legal fees and damages if the state court upholds [petitioner's] claim. Even if [petitioner's] lawsuit is dismissed by the state court, Helton and the other picketers will have been required to pay legal fees as a direct consequence of her having filed a charge with the Board.

The Board ordered petitioner, inter alia, to reinstate Helton with backpay, to reinstate the three striking waitresses,[11] to withdraw the civil suit, and to reimburse

---

practices; that the complaint was the result of a charge filed by Helton; and that Helton had been discharged after suggesting to other waitresses that they should organize a union. The ALJ found that Helton was, in fact, discharged because of her union activity. The unrefuted evidence showed that the waitresses were the object of sexual advances by both Vice President Johnny Johnson and General Manager Don Kalfus—advances that were not limited to oral solicitations, but included unwanted hugging, kissing, and similar physical contacts, and that in one case involved a lewd proposition made by Vice President Johnson inside the women's restroom, where he apparently had been waiting for a waitress to enter. The evidence also established that an unused shower stall in the women's restroom served as a storage area for the brooms, rakes, and sawdust bags used to spread sawdust on the Restaurant floor; that the bags were sometimes lying on the floor, so that the women had to step over them to use the facilities; that the bags were often wet, since the unused shower continually dripped, and that the sawdust had clogged up the drain, so that "stagnated" water had collected in the stall; that there were no trash cans provided, so that paper towels were usually thrown on the floor; and that there were frequently no towels, no soap, and no toilet paper (Pet. App. A-10 to A-11, A-40 to A-42; J.A. 2, 4, 148-151, 140-143, 125-126, 128-130, 131-133; Tr. 456-457; J.A. 154-156, 138-140, 117-118).

[11] Although the Board upheld the ALJ's finding that the waitresses were not discharged, it concluded that they were entitled to reinstatement as unfair labor practice strikers (Pet. App. A-14 n.2).

Helton and the other defendants in that suit for the legal expenses they incurred[12] (Pet. App. A-14 to A-15, A-42 to A-55).

3. The court of appeals affirmed the Board's decision and enforced its order (Pet. App. A-3 to A-13). The court of appeals agreed with the Board that filing of a civil suit against an employee in bad faith in furtherance of an unlawful objective can be an unfair labor practice (*id.* at A-9 to A-10, citing *United Credit Bureau of America, Inc.* v. *NLRB*, 643 F.2d 1017, 1023 (4th Cir.), cert. denied, 454 U.S. 994 (1981), and *Power Systems, Inc.* v. *NLRB*, 601 F.2d 936, 939 (7th Cir. 1979)). The court of appeals found "substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity" (Pet. App. A-10).

The court of appeals noted petitioner's failure to produce any evidence that would demonstrate that its complaint had a reasonable basis in fact (Pet. App. A-10 to A-11):

> The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated * * *. The mass picketing alleged in the complaint never materialized * * *.
>
> The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with "actual malice"

---

[12] Petitioner's request for a preliminary injunction was denied on November 16 (J.A. 52). The suit for a permanent injunction and for damages was still pending at the time of the Board's decision (Pet. App. A-6, A-37 to A-38).

> * * *. [T]he restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements.

The court of appeals also relied on management's threats to Helton and the pickets, including Manager Sturgeon's promise to "get even with you if it's the last thing I do" and President Gene Johnson's veiled threat to a picket that she would hate to see him and his wife "get hurt by all of this;" the timing of the lawsuit which was filed just five days after those threats; and petitioner's immediate use of the civil suit to depose Helton about the identities of other pro-union employees (*id.* at A-11).[13]

The court of appeals rejected petitioner's contention (Pet. App. A-11) that "its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction." The court stated that "[m]ore than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis." The court of appeals also rejected petitioner's assertion that the Board could not order the employer to withdraw the state court action, stating (*id.* at A-12):

> Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice. The federal anti-injunction statute, 28 U.S.C. 2283, does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction.

---

[13] The court of appeals noted that Helton's deposition "almost certainly had a chilling effect on Helton and the other picketers. It also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings" (Pet. App. A-11 to A-12 n.2).

SUMMARY OF ARGUMENT

1. Section 8(a)(1) and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (4), generally prohibits employer conduct that is intended to, or that has the likely effect of, restraining employees in the exercise of rights protected under the Act, including the right to file charges with the Board. When an employer files a civil suit against its employees in the context of a labor dispute, such a suit may well restrain employees in the exercise of their rights under the Act. Although the Board has moved carefully in this area of the law, because of concern for the right of persons to litigate their claims in court, it has concluded properly that an employer's filing of a suit may constitute an unfair labor practice if the suit is intended to retaliate against employees for engaging in protected activity. The questions presented by petitioner for review do not include a challenge to the Board's finding, upheld by the court of appeals, that it filed a civil suit against its employees for the purpose of retaliating for their protected conduct. The Board properly concluded that filing of that suit constitutes an unfair labor practice.

a. The general rule followed by the Board is that an employer or a union that brings a civil suit against employees does not commit an unfair labor practice, even when the suit seeks to enjoin employees from exercising a protected right. However, both the Board and the courts of appeals have recognized an exception to this general rule in cases in which a suit is not filed in good faith to enforce a colorable claim, but is intended to retaliate against employees for exercising rights protected under the Act and to discourage the future exercise of such rights. The exception applies in cases in which an employer or union files a suit against an employee without a reasonable basis in fact in retaliation for the employee's resort to the Board's process.

b. The Board's policy reflects a proper balancing of the interests relevant to filing of a civil suit in the con-

text of a labor dispute. While any such suit may operate to discourage employees from exercising their rights under the Act, a suit filed in retaliation for the exercise of rights is particularly likely to do so. When the employer requests sizeable monetary damages and immediate injunctive relief, the employees who are sued must hire counsel immediately and spend time defending the case. Other employees are made aware that they, too, can expect to be sued if they choose to engage in protected activity. Allowing the suit to proceed in state court does not adequately protect rights under the Act. Although an employee-defendant may prevail eventually on the merits of the suit, the monetary cost may be high, and there may be substantial deterrence of protected activity in the interim. In addition, the ability of the Board to seek preliminary relief from a federal district court after an unfair labor practice charge has been filed, see 29 U.S.C. 160(j), does not adequately protect the exercise of rights guaranteed by the Act in the case of a retaliatory suit.

On the other hand, the interests of the plaintiff and the states in state court adjudication of causes of action arising under state law are minimal in the case of retaliatory suits. Such interests may be strong when a suit is brought in good faith. However, the retaliatory suit is brought not to obtain vindication of a right protected by state law, but to retaliate against employees for their exercise of federally protected rights. There is little reason for deference to state courts in such a case. Moreover, the need for protection from the filing of an insubstantial state claim for the purpose of retaliation for federally protected conduct is independent from state concern for protecting its citizens and judicial system from abuse of process—and requires the application of different standards.

The Board's policy is analogous to principles that courts have developed in other areas of the law. Under Section 1 of the Sherman Act, 15 U.S.C. 1, the general rule is that agreement to initiate and prosecute administrative or judicial proceedings is not a violation of the

antitrust laws, even if the proceedings may result in an anticompetitive effect. However, a court may find an antitrust violation in the case of an agreement to pursue "sham" litigation, in which the purpose of initiating the proceedings is not to obtain an available remedy, but merely to harass a competitor. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Another analogy is the exception to the general prohibition on federal interference in state court proceedings brought by state officials when such proceedings have been brought in bad faith or for the purpose of discouraging protected activities. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965). The common law tort of abuse of process, which includes misuse of a process for an end other than that for which it was designed, provides a further analogy.

c. The Board in this case properly found that petitioner brought its suit in order to retaliate against its employees for their protected activity, including their resort to the Board's processes, and thereby committed an unfair labor practice. The Board relied on various statements by representatives of petitioner that indicated that the suit was filed for the purpose of retaliation against employees for engaging in protected activity. The Board also relied on the timing of the suit and the questions asked at the depositions. In addition, the Board found that petitioner had not shown any reasonable basis in fact for the filing of its suit, since it produced no evidence that would have supported any of its state court allegations. The Board did not attempt to rule on the merits of the state court suit, but merely afforded petitioner an opportunity to demonstrate that it had some colorable claim on which to base the suit.

d. Petitioner cites several cases in which this Court concluded that particular state causes of action are not preempted by the federal labor laws. These cases, including *Linn* v. *United Plant Guard Workers, Local 114*,

383 U.S. 53 (1966), and *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), are inapposite. The Board's finding of an unfair labor practice in this case is not affected by whether or not the cause of action alleged in the state court complaint was preempted. The Board did not attempt to adjudicate the merits of the state court suit; rather, it addressed the very different question whether the filing of the suit itself constituted an unfair labor practice because it was designed to retaliate against employees for engaging in protected activity. Thus, the question of preemption is irrelevant.

2. Section 2283 (28 U.S.C.), which prohibits federal courts from granting injunctions to stay state court proceedings except in certain circumstances, does not preclude the Board from ordering petitioner to dismiss its civil action. That statute does not apply to the enforcement by federal agencies of federal rights, and thus does not bar the Board from ordering a remedy for the unfair labor practice it found in this case. See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971).

ARGUMENT

I. THE BOARD PROPERLY CONCLUDED THAT PETITIONER VIOLATED THE NATIONAL LABOR RELATIONS ACT WHEN IT BROUGHT A CIVIL SUIT IN ORDER TO RETALIATE AGAINST ITS EMPLOYEES FOR FILING UNFAIR LABOR PRACTICE CHARGES WITH THE BOARD AND FOR ENGAGING IN OTHER ACTIVITIES PROTECTED BY THE ACT

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.[14] Section 8(a)(4)

[14] A similar provision makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of Section 7

of the Act, 29 U.S.C. 158(a)(4), makes it an unfair labor practice for an employer to discharge or otherwise discriminate against employees who have filed charges with the Board. These provisions generally prohibit any employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of their right to engage in union or other concerted activity for mutual aid and protection, including the right to file charges with the Board to obtain redress for such restraints. See *NLRB* v. *Scrivener*, 405 U.S. 117, 121-125 (1972); *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964); see also *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 422 (1968) (explaining Section 8(b)(1)(A) of the Act, 29 U.S.C. 158 (b)(1)(A), a parallel provision applicable to restraints by unions). The courts have recognized that a wide range of employer conduct can constitute a violation of Section 8(a)(1) and (4). See, e.g., *NLRB* v. *Scrivener*, *supra* (discharge for providing information to Board investigator); *NLRB* v. *Exchange Parts Co.*, *supra* (grant of employee benefits designed to discourage vote for union); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-619 (1969) (prediction of economic harm as result of unionization not based on objective facts); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945) (company rule forbidding employee union solicitation on company property during non-working time); *NLRB* v. *Taber Instruments*, 421 F.2d 642, 643-644 (2d Cir. 1970) (threat of retaliation for engaging in union activity); *Ridgewood Management Co.* v. *NLRB*, 410 F.2d 738, 740 (5th Cir.), cert. denied, 396 U.S. 832 (1969) (coercive interrogation concerning organizational activity).

---

rights. See Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A). Section 7 provides, inter alia, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

The filing of a civil suit by an employer against its employees in the context of a labor dispute clearly has the potential for interfering with the employees' exercise of protected rights, including the right to file charges with the Board. Filing of such a suit normally requires the employee-defendants to expend time and money immediately in order to defend the suit, and may expose them to high potential monetary liability. Thus, the suit is likely to create considerable pressure on the employee-defendants to cease the challenged activity, even though it is protected by the Act. Moreover, filing of a suit may well discourage protected activity by other employees, who have been put on notice that they risk a similar suit. If an employer files a civil suit in response to an employee's filing of unfair labor practice charges with the Board, employees could be discouraged from invoking the Board's process or cooperating with Board investigations.

Despite the considerable potential for interference with protected activity in violation of the provisions of the Act, the Board has moved with considerable caution in evaluating civil suits filed in the context of a labor dispute. The Board has recognized, as did the court below (Pet. App. A-13), that such cases "involve[] a delicate balance between federal and state interests as well as between individual rights of organization and litigation." As the court below noted (*ibid.*), "[t]he Board has demonstrated its sensitivity to these issues by its sparing enforcement of limitations on the right to bring suit in state court." The Board has held correctly that a narrow class of suits against employees—those brought in bad faith, for the purpose of retaliation for exercise of protected rights—may constitute the basis for a finding that an employer or union has committed an unfair labor practice.

The questions presented by petitioner for review do not include a challenge to the Board's finding, upheld by the court of appeals, that it filed a civil suit against its employees for the purpose of retaliating for their protected conduct. The Board properly concluded that filing of that suit constitutes an unfair labor practice.

A. The Board Has Concluded That Filing of a Civil Suit Normally Will Not Violate the Act, but Has Recognized an Exception for Cases in Which a Suit Is Brought in Order to Retaliate Against Employees for Engaging in Activities Protected by the Act

The court of appeals correctly stated (Pet. App. A-9) that "it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective." In *Clyde Taylor Co.*, 127 N.L.R.B. 103, 109 (1960), the Board articulated its basic policy of "accommodat[ing] its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn[ing] the exercise of such right as an unfair labor practice." The Board held in *Clyde Taylor* that the employer had not violated the Act by obtaining a state court injunction banning peaceful picketing, even though such picketing was protected by Section 7 of the Act, 29 U.S.C. 157.[15] As the Board subsequently explained, "going to a judicial body for redress of alleged wrongs * * * stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), enforcement denied on other grounds, 498 F.2d 43 (3d Cir. 1974) (trespass action against employee pickets). Moreover, "[t]he presumption * * * is that the court can be relied upon to give due effect to the con-

---

[15] The Board did find that the employer's *threat* to sue for libel employees who filed unfair labor practice charges violated the Act. The Board stated (127 N.L.R.B. at 108): "Such a threat * * * is of a harassing nature. It would normally tend to intimidate an individual contemplating filing a charge, from doing so, or one, who has filed a charge, to withdraw it." See also *S.E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977) (threat to sue for slander employee who claimed supervisor made anti-union statement violated the Act, but slander suit itself was not a violation).

trolling law." *Smith Steel Workers*, 174 N.L.R.B. 235, 241 (1969), enforced in relevant part, 420 F.2d 1, 9 (7th Cir. 1969) (suit to compel arbitration).[16] See also *Associated General Contractors* v. *NLRB*, 637 F.2d 556, 560-562 (8th Cir. 1980) (employer's suit against union to enforce contract).

However, both the Board and the courts of appeals have recognized an exception to the general rule in cases in which a suit was not filed "in good faith to enforce a colorable * * * [claim] and was * * * the kind of tactic calculated to restrain employees or employers in the exercise of rights guaranteed by the Act." *Retail Clerks Union Local 770*, 218 N.L.R.B. 680, 683 (1975). Thus, in *International Organization of Masters, Mates and Pilots*, 224 N.L.R.B. 1626, 1634 (1976), aff'd, 575 F.2d 896, 906-907 (D.C. Cir. 1978), the Board held that a union had violated Section 8(b)(4) and (1)(B) of the Act, 29 U.S.C. 158(b)(4) and (1)(B), by filing an in rem action against a vessel, thereby requiring the vessel's owners to obtain security in the amount of $100,000 to secure the vessel's release. The Board rejected the union's assertion "that the Board may not displace 'the ancient and traditional rights' of the former officers of the vessel in filing 'a maritime lien against his vessel for both

---

[16] See also *American Federation of State, County & Municipal Employees*, 262 N.L.R.B. No. 121 (July 15, 1982), slip op. JD 6 n.10 (suit to enforce strike settlement agreement); *Airport Limousine Service, Inc.*, 231 N.L.R.B. 932, 935 (1977) (bankruptcy petition to reject collective agreement); *S.E. Nichols Marcy Corp., supra; Local 259, United Automobile Workers*, 221 N.L.R.B. 656, 661 (1975) (suit to enforce arbitration award); *Retail Clerks Union Local 770*, 218 N.L.R.B. 680, 683 (1975) (suit to enforce arbitration award); *Los Angeles Building & Construction Trades Council*, 217 N.L.R.B. 946, 948 (1975) (damage suit for breach of contract); *DC International, Inc.*, 162 N.L.R.B. 1383, 1394, enforcement denied in part on other grounds, 385 F.2d 215 (8th Cir. 1967) (trespass action against discharged employee); *Fashion Fair, Inc.*, 159 N.L.R.B. 1435, 1449 (1966) (state court injunction against peaceful picketing); *American Bakery & Confectionery Workers*, 128 N.L.R.B. 937, 938 (1960) (union suit to enjoin continued employment of disfavored employee).

earned and unearned wages'" (224 N.L.R.B. at 1634). The Board found that the suit was not brought for the purpose alleged by the union but rather was brought with the unlawful objective of compelling the vessel to employ officers represented by it rather than those represented by another union (*id.* at 1634-1635). The Board added (*id.* at 1626 n.2) that, since the "reason offered by the [union] for its action was 'an afterthought, constituting a stratagem to mask [its] real intent' the filing of the lawsuit may not have been taken in complete good faith." The court of appeals upheld the Board's decision, stating (575 F.2d at 907) that, since "the lawsuit was coupled with a lien, and was intimately related to ongoing picketing for an unlawful objective and 'may not have been taken in complete good faith,' we can see no inconsistency between *Clyde Taylor Co.* (and its progeny) and the Board's determination in this instance" (citation omitted).[17]

The Board, again with the approval of the courts of appeals, has held that the general *Clyde Taylor* rule does not apply in cases in which an employer or a union files suit against an employee without any reasonable basis, in retaliation for the employee's resort to the Board's processes. See *Power Systems, Inc.*, 239 N.L.R.B. 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979); *United Credit Bureau of America, Inc.*, 242 N.L.R.B. 921, 925-926 (1979), enforced, 643 F.2d 1017, 1022-1024 (4th Cir.), cert. denied, 454 U.S. 994 (1981); *George A. Angle*, 242 N.L.R.B. 744, 748 (1980), enforced, 683 F.2d 1296 (10th Cir. 1982); *Sheet Metal Workers' Union Local 355*, 254 N.L.R.B. 773, 778-780 (1981).

---

[17] See also *Bergman* v. *NLRB*, 577 F.2d 100, 103-104 (9th Cir. 1978) (union's suit against employer to enforce contract permitted where there was "no suggestion * * * that the union's action approaches malicious prosecution or abuse of process"); *Lodges 743 and 1746, International Association of Machinists & Aerospace Workers* v. *United Aircraft Corp.*, 534 F.2d 422, 464-465 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976) (damage suit for violence by strikers; upholding application of *Clyde Taylor* rule in case in which facts did not show improper motivation or abuse of process).

Thus, in *Power Systems*, the employer filed a state court damage action alleging that a discharged employee had filed charges with the Board contesting his discharge, "without probable cause and for the purpose of harassing" the employer (239 N.L.R.B. at 446). The Board found that the employer "had no reasonable basis for filing the lawsuit" but "had as its purpose the unlawful objective of penalizing [the employee] for filing a charge with the Board, and thus depriving him of, and discouraging employees from seeking access to the Board's processes" (*id.* at 450). The Board explained (*id.* at 449) (footnote omitted):

> [The employer's] lawsuit placed its employees on notice that if an employee files charges with the Board which are deemed by the General Counsel to be nonmeritorious that employee is subjecting himself to the possibility of a devastating lawsuit. In the instant case [employee] Sanford faced the prospect of having to reimburse [the employer] for thousands of dollars in legal expenses if the state court upheld [its] claim. Of even more significance, however, is the fact that Sanford incurred immediate expense by having to retain legal counsel to defend himself against [the employer's] lawsuit. Thus, even if [the employer's] lawsuit is dismissed by the state court, Sanford will have suffered a significant property loss as a direct consequence of his having filed a charge with the Board.

The court of appeals denied enforcement in *Power Systems* because it concluded that the record did not support the Board's finding that the lawsuit had no reasonable basis. The court nevertheless "recognize[d] that civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board and the Board may, in a proper case, act to curb such conduct" (601 F.2d at 940). And see *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 643 F.2d at 1023-1024; *Angle* v. *NLRB*, *supra*, 683 F.2d at 1300 n.2.[18]

---

[18] This Court upheld the Board's conclusion that it is an unfair labor practice for a union to seek court enforcement of fines im-

B. The Board's Conclusion That the Filing of a Civil Suit for the Purpose of Retaliating Against Employees for Exercise of Protected Rights Constitutes an Unfair Labor Practice Reflects an Appropriate Weighing of the Relevant Interests

As we have shown, the Board has been careful to take into account the interests that are relevant to a claim that filing of a civil suit in the context of a labor dispute constitutes an unfair labor practice. On the one hand, the employee and the Board, as the protector of the interests underlying the national labor laws, share an interest in ensuring that employees are not restrained in the exercise of rights guaranteed to them under the National Labor Relations Act. On the other hand, the employer (or union) has an interest in vindicating any rights provided to it under state law, at least to the extent the state law is not preempted by the national labor policy, and the state has an interest in ensuring that its citizens have an opportunity to vindicate such rights.

In balancing these interests, the Board has tended to lean in the direction of preserving opportunities to adjudicate state law issues in state court. Thus, although any filing of a civil suit in this context may be likely to discourage employees from exercising their rights, it is only in rare instances that the Board has concluded that the filing of such a suit constitutes an unfair labor practice. In the class of cases involved here the Board has

---

posed on employee-strikebreakers who had resigned from the union before engaging in the activity for which they were fined. See *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers*, 185 N.L.R.B. 380 (1970), enforced, 412 U.S. 84, 85 (1973); *NLRB* v. *Granite State Joint Board, Textile Workers Union, Local 1029*, 409 U.S. 213, 214 (1972). See also *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 722 n.2 (1976) (union's damage action against employee to enforce unlawful union security provision violated Act); *United Stanford Employees, Local 680*, 232 N.L.R.B. 326, 331 (1977), enforced, 601 F.2d 980 (9th Cir. 1979) (suit against employees to compel union membership, when employees only had a "financial core" obligation, violated Act).

specifically found that the suit was filed for the purpose of retaliation for an employee's exercise of protected rights, often including the filing of charges with the Board, rather than in a good faith effort to vindicate a right conferred by state law. Such retaliatory suits are those most likely to interfere with employees' exercise of rights under the Act, as well as those whose prohibition is least likely to interfere with any significant state interest.

1. ***In Order to Provide Adequate Protection for Employee Rights Under the Act, the Board Must Be Able to Conclude That Filing of a Civil Suit for the Purpose of Retaliation for the Exercise of Protected Rights Constitutes an Unfair Labor Practice***

Filing of a civil suit for purposes of retaliation against employees for engaging in protected activity presents a serious threat to the rights Congress established in the National Labor Relations Act. Of course, any type of retaliation poses a threat to the right to engage in protected activity; however, filing of a retaliatory suit is particularly likely to discourage employees from engaging in such activity. The employees against whom suit is filed are immediately burdened with the time and expense of hiring counsel and defending against the suit. Where, as here, the employer seeks very substantial damages, employees cannot afford not to mount a defense. Moreover, when the employer, like the petitioner here, immediately requests a temporary restraining order, depositions, and a preliminary injunction, the suit can disrupt significantly the lives of the employee-defendants. Since a lawsuit is a matter of public record, other employees are bound to recognize that the result of engaging in protected activity, including pursuit of Board remedies, is involvement in expensive litigation with the possibility of potentially devastating monetary liability.

Of course, litigation is always costly and time-consuming, and its prospect a deterrent. In most cases,

the time and expense are tolerated because individuals must be allowed to pursue their legal remedies. But retaliatory suits are particularly likely to discourage protected activity, since it often will be apparent, from statements made by representatives of the employer or union and from surrounding circumstances, that the suit is tied to the employees' exercise of protected activity. Moreover, retaliatory suits that are brought as a result of an employee's filing of charges with the Board would hamper the Board's processes by deterring employees from filing charges in the future. It is especially important that the Board be able to proscribe such retaliatory suits as an unfair labor practice and impose remedies that will deter them, in order to preserve an atmosphere in which employees are not discouraged from, and punished for, the exercise of protected activity.

Justice Rehnquist has suggested that, "[i]f the application of state tort law interferes with the national objective that employees not be impeded in cooperating with the NLRB in enforcing the NLRA," the employee may appeal that wrongful exercise of state power "through the state system and ultimately to this Court." *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 454 U.S. at 999 (Rehnquist, J., dissenting from denial of certiorari). However, such an endeavor requires an expenditure of funds that the employee may be unable or unwilling to incur, and the employee may simply conclude that it is more prudent not to pursue his or her claim with the Board. Even if the employee-defendant perseveres and eventually prevails in the state court action, other employees may well be deterred from engaging in protected activity in the meantime. Thus, although a state court adjudication may result in eventual victory for the employee-defendants, the cost is likely to be great and the interim deterrence significant. Such a chilling of employees' willingness to engage in protected activity and to bring alleged violations of the Act to the Board's attention is exactly what Section 8(a)(1) and (4) was de-

signed to preclude. See *NLRB* v. *Scrivener, supra*, 405 U.S. at 121-125; *Nash* v. *Florida Industrial Commmission*, 389 U.S. 235, 238 (1967). Cf. *Clayton* v. *International Union*, 451 U.S. 679, 693 n.22 (1981) (inconsistent with federal policy to require exhaustion of internal union procedures where to do so "might deplete the employee's energy and resources to the point where he chooses not to pursue his § 301 claim in court"). Moreover, the statutory scheme, which provides for prosecution of unfair labor practice complaints by the General Counsel, contemplates that employees can vindicate their rights under the Act without the expense of hiring private counsel. That purpose is defeated if employees must hire counsel to defend themselves against suits that are meant to discourage their exercise of rights under the Act.[19]

In cases in which a civil suit is clearly retaliatory, the machinery of the state court system simply cannot offer employees the protection that is necessary to preserve their rights under the national labor laws. It is not at all clear that a state court would be in a position to consider a claim that a suit had been filed for the purpose of retaliating for exercise of a federally protected right, nor whether it could provide an appropriate remedy to an employee if it were to entertain such a claim. While a state court is free to decide whether its process has been abused and to grant a remedy for such abuse, that is quite different from determining whether resort to the state court in the circumstances violates federal labor policy. Moreover, it is the province of the Board, rather than of the state courts, to decide whether an unfair labor

---

[19] Even if Helton and the other employees were ultimately to prevail on the merits of the libel suit in the state courts, they probably would not receive attorney's fees. Arizona does permit an award of attorney's fees without the maintenance of a subsequent action "upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless or not made in good faith," Ariz. Rev. Stat. Ann. § 12-341.01(C) (West 1982). However, the state court dismissed the counterclaim for abuse of process filed by the employees (Pet. Br. App. D1).

practice has been committed and, if so, to provide an appropriate remedy.

Petitioners urge (Pet. Br. 32) that the Board's ability to obtain temporary injunctive relief that the district court finds to be "just and proper," pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j), is sufficient to protect against "inappropriate employer discovery." See also *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 454 U.S. at 999 (Rehnquist, J., dissenting from denial of certiorari) ("If the NLRB concludes that a pending state-court proceeding interferes with its jurisdiction, it may seek an injunction in a federal district court."). However, as shown (pages 24-25, *supra*), it is not only the impact of a retaliatory state suit on the pending Board proceeding, but also the deterrent effect that such a suit would have on the future exercise by employees of their Section 7 right to engage in union or other concerted activity and to file charges with the Board respecting restraint on such activity, that is relevant for purposes of the Act. Accordingly, even if it could not be shown that the state suit specifically interfered with a pending Board proceeding, the Board should nonetheless be entitled to proscribe such a suit because of its likely deterrent effect on the future exercise of Section 7 rights. The Board's authority temporarily to protect its own processes against an immediate interference is not an adequate substitute for its general duty to remedy unfair labor practices.

Moreover, as a practical matter, evaluation of the motive underlying the filing of a civil suit may be more appropriate in the context of an unfair labor practice proceeding than in the context of a proceeding for temporary injunctive relief. There is far more opportunity for careful development of a factual record in a hearing before an administrative law judge than in a summary proceeding in which the Board seeks temporary relief in the early stages of a case. The Board is a specialized agency with expertise in the area of evaluating motives and conduct of parties to a labor dispute; thus, the Board is better equipped than a court to determine

whether filing of a civil suit constitutes a tactic to restrain the exercise of rights protected by the Act (as opposed to the issue of which party would prevail on the merits of the civil suit). A Section 10(j) proceeding may not afford the full relief to employees, including an award of legal expenses incurred in defending a suit brought in bad faith, that would be available from the Board itself. Finally, the finding that an employer or a union has committed an unfair labor practice may well be a more effective deterrent to future unlawful conduct than a preliminary injunction against prosecution of a particular suit.

This case and others like it involve policy considerations similar to those underlying this court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-240 (1978). In *Robbins* the Court held that under an exemption contained in the Freedom of Information Act, 5 U.S.C. 552(b)(7)(A), the Board properly refused to permit prehearing disclosure of witness statements taken during investigation of an unfair labor practice case. The Court found that the Board's refusal was justified because of the possibility of "witness intimidation" and the chilling effect on willingness of potential witnesses to cooperate in Board investigations. The Court rejected the contention that the possibility of a subsequent Section 8(a)(4) charge would deter employer misconduct in the use of discovered materials, declaring (437 U.S. at 239-240; footnote omitted) that "the possibility of deterrence arising from *post hoc* disciplinary action is no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding which flows from a witness having been intimidated." The Court concluded that prehearing disclosure of witnesses' statements would interfere with Board enforcement proceedings by "giving a party litigant earlier and greater access to the Board's case than he would otherwise have" (*id.* at 241).

Analogous considerations apply in cases in which employers file civil suits in retaliation for protected ac-

tivity. Filing and prosecution of a civil suit can result in a chilling effect long before a state court can resolve the case. Moreover, an employer may use the court proceedings for improper purposes. In the present case petitioner used the state court discovery proceedings to question the defendant employees about matters that were relevant only to the unfair labor practice proceedings; in addition, it actually used the information gained from deposing Helton as the basis for questioning an ex-employee about the extent of union organization at the Restaurant. Thus, if an employer may pursue insubstantial litigation in state court in retaliation for an employee's filing of unfair labor practice charges, it could, through the use of state court discovery proceedings, achieve the same deleterious result that the Court sought to avoid in *Robbins*. In order to minimize such chilling effects and thereby protect adequately the rights afforded to employees under the Act, the Board must be able to identify filing of a retaliatory suit as an unfair labor practice and to provide an appropriate remedy.[20]

---

[20] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240, 253-254 (1939), cited by petitioner (Pet. Br. 21-22), does not stand for the proposition that an employer is privileged to pursue a bad faith suit. In *Fansteel*, the Court rejected the Board's conclusion that the employer unlawfully discharged employees who participated in a sit-down strike that had been enjoined by a state court. There were no allegations that the employer's resort to state court to recover its property was unlawful or that the state court action was pursued for any purpose other than the recovery of the property. Similarly, in *S.E. Nichols Marcy Corp.*, *supra*, also cited by petitioner (Pet. Br. 15), there was no finding that the slander suit, which had been filed by the allegedly slandered supervisors and not by the employer, was filed for any purpose other than to collect the damages sought in the suit.

2. *The Board's Conclusion that the Filing of a Civil Suit for a Retaliatory Purpose Constitutes an Unfair Labor Practice Does Not Interfere in Any Significant Way With the Interest of States in Adjudication of Common Law Tort Claims and Protection of the State Judicial Process From Abuse*

The interest of the states in state court adjudication of a civil suit filed for the purpose of retaliating against employees for the exercise of federally protected rights is minimal. We recognize that state courts traditionally have handled state tort claims and have expertise in this area, and that states have a legitimate interest in affording persons an opportunity to vindicate rights created by state law. But these interests are relevant primarily to suits brought in good faith for the purpose of recovering for injuries suffered as a result of violation of state law. In a case brought, not for the purpose of vindicating rights grounded in state law, but for the purpose of retaliating against employees for their exercise of federally protected rights, the interest in state court adjudication of the merits of the case is quite weak. States can have little genuine interest in ensuring that insubstantial or sham litigation is conducted in their courts. At the same time, as we have shown, the federal interest in preventing the chilling of rights protected by the national labor laws is strong. Thus, considerations of federalism are properly reflected in the distinctions the Board has drawn, which leave normal state court cases brought in good faith to state court adjudication.

While a state court may be concerned to protect state judicial processes from abuse in the form of bad faith or sham lawsuits, that concern is not an adequate substitute for the protection of federal statutory rights from unwarranted interference. An insubstantial state claim filed for the purpose of retaliation for federally protected conduct can constitute an interference with federal rights even if it does not rise to the level of abuse of process under state law.

3. *The Board's Policy with Respect to Retaliatory Civil Suits Is Similar to Principles the Courts Have Applied in Other Areas of the Law*

The rule applied by the Board in the case of a civil suit filed in the context of a labor dispute is similar to legal principles that have been developed in other areas. One example arises in the field of antitrust. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court held that the prohibition of Section 1 of the Sherman Act, 15 U.S.C. 1, against unreasonable agreements that restrain trade affecting interstate commerce does not reach private agreements to influence the legislative or executive branch with respect to laws that would have an anticompetitive effect. Accord: *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-671 (1965). In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511 (1972), the Court indicated that the policies underlying *Noerr* likewise shield from the Sherman Act agreements to seek adjudication in courts and administrative agencies as a means of lessening competition. The Court held that the constitutionally protected right to petition "extends to all departments of the Government," and that the "right of access to the courts is indeed but one aspect of the right of petition" (404 U.S. at 510).

However, the Court in both *Noerr* and *California Motor Transport* noted that finding of a Sherman Act violation would be justified in situations in which the conduct ostensibly directed toward influencing governmental action " 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor * * *' " (404 U.S. at 511, quoting 365 U.S. at 144). Since the complaint in *California Motor Transport* alleged that the proceedings at issue were instituted "to harass and deter [the competitors] in their use of administrative and judicial proceedings * * *" (404 U.S. at 511), and that they were instituted " 'with or without probable cause, and regardless of the merits

of the cases' " (*id.* at 512, citation omitted), the Court concluded that "such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the [competitors] from invoking' the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*" (*ibid.*). See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 380 (1973) ("the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims * * * is within the 'mere sham' exception announced in *Noerr*"). And see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978) (allegation of sham and frivolous litigation for the purpose, and with the effect, of delaying construction of a competing power plant); *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15 (1978) ("Dealers who press sham protests before the * * * Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws.").[21]

In sum, under the exception to the *Noerr* doctrine, litigation is not actionable under the antitrust laws

> merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through

---

[21] It is an unsettled question whether a single sham suit would come within the *Noerr* exception. See *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (plurality opinion), 644 (concurring opinion), 661-662 (1977) (dissenting opinion). And see *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1265-1267 (9th Cir. 1982). See generally Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L. Rev. 39, 49-56 (1980); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 108-110 (1977). Even if a single suit could not constitute a violation of the antitrust laws, it would not follow that a single suit could not violate the National Labor Relations Act. A single suit by an employer or union against employees is likely to have a greater chilling effect than a single suit by a company against its competitor. See pages 24-25, *supra*.

> lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself —regardless of outcome—of litigating.

Grip-Pak, Inc. v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982). And see *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1265-1266 (9th Cir. 1982) (emphasis in original):

> The sham exception * * * reflects a judicial recognition that not all activity that appears as an effort to influence government is actually an exercise of the first amendment right to petition. At times this activity, disguised as petitioning, is simply an effort to interfere directly with a competitor. In that case, the "sham" petitioning activity is not entitled to first amendment protection, *because it is not an exercise of first amendment rights.*

Under both the *Noerr* doctrine and the Board's *Clyde Taylor* policy, the general rule is that resort to the courts is not unlawful. However, under both doctrines, an exception exists for situations in which "the plaintiff wants to hurt [another] not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, *supra*, 694 F.2d at 472.

Another analogy to the Board's policy is this Court's recognition of an exception to the judicial policy against federal interference in state court proceedings brought by state officials for proceedings brought in bad faith or "for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, 380 U.S. 479, 490 (1965). See also *Younger* v. *Harris*, 401 U.S. 37, 53-54 (1971); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975) ("*Younger*, and its civil counterpart * * * do of course allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith * * *.").

A further analogy is presented by the common law tort of abuse of process. See *United Credit Bureau of America, Inc.* v. *NLRB*, *supra*, 643 F.2d at 1024. In such cases, as under the Board policy, "the gist of the tort is * * * misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." W. Prosser, *Handbook of the Law of Torts* 856 (4th ed. 1971).[22] See also *Restatement (Second) of Torts* § 682 (1977). Thus, in *Alexander* v. *Unification Church of America*, 634 F.2d 673, 678 (2d Cir. 1980), the court held that a complaint stated a claim for abuse of process when it alleged that a damage suit brought by a church against certain persons for deprogramming activities was not actually for the purpose of obtaining damages for church members, but sought to "compel the appellants to cease their deprogramming activities by putting them to the trouble and expense of litigation." That allegation is analogous to the Board's finding in this case, upheld by the court of appeals, that petitioner's suit was not motivated by a desire to collect damages from its employees for the alleged torts, but was intended to deter the employees from filing charges with the Board and engaging in other protected activities.

In each of these areas, the courts have considered carefully the strong interest of litigants in vindicating their rights under state or federal law, as well as the public interest in ensuring that there is ample opportunity for such vindication in the courts of the appropriate jurisdiction. In general, wide latitude is afforded to plaintiffs,

---

[22] Prosser notes that in the case of abuse of process (as distinguished from malicious prosecution), it is unnecessary to show that the lawsuit was not meritorious. See also *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, *supra*, 694 F.2d at 472. However, Prosser points out that an action for abuse of process requires "a wilful act in the use of process not proper in the regular conduct of the proceeding." W. Prosser, *supra*, at 857. In addition to the filing of the suit itself, petitioner's improper use of the information gained in the depositions of its employees (pages 35-36, *infra*) would constitute a use of process for a purpose other than that for which it was intended.

even when their claims are found to be without merit. But courts have drawn the line at cases that are not brought for the purpose of obtaining the remedy afforded by the law, but rather for the purpose of harassing others or deterring them from protected conduct. In such cases the courts have concluded that the interest in protecting the right to litigate is weak enough that the litigation itself may be found to violate the law. Cf. *Georgia* v. *Rachel*, 384 U.S. 780, 805 (1966) ("It is no answer [in a civil rights removal case] * * * that the defendants might eventually prevail in the state court. The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 * * *.") (footnote omitted). Thus, the Board's policy is in no way an aberration, but is consistent with well-established principles applied in other areas of the law.

C. The Board Properly Concluded in This Case That Petitioner Filed Its Civil Suit for a Retaliatory Purpose and Thereby Committed an Unfair Labor Practice

The Board relied on a number of facts to support its finding that petitioner filed its civil suit for the purpose of retaliation against Helton and the other employees for their exercise of protected rights, rather than for purposes of recovering for alleged libel, mass picketing and business interference. In addition to threats of Restaurant management personnel to get even for the employees' engaging in protected activity (page 4, *supra*), the Board noted that five days after petitioner threatened its employees with reprisals it sued them for half a million dollars. As the court of appeals noted, the suit forced the employees to retain counsel, for, while employees may choose to default in a suit for an injunction against picketing, "[t]hey can hardly fail to defend a claim for $500,000 damages" (Pet. App. A-12 n.3). When Helton, on the day the suit was filed, told Lawrence Katz, the Restaurant's attorney, that he should not be scaring the pickets with the suit, he responded, "[a]ren't you?" (*id.* at A-36). Petitioner not only moved to shorten the time

within which to take depositions and scheduled Helton's deposition for two days after the date of filing of the suit; it questioned her "about the identity of other pro-union employees" (*id.* at A-11)—a matter that had nothing to do with the state court suit. Petitioner then used the information it had gained in the deposition as the basis for interrogating a former waitress about its employees' organizational activity (page 7, *supra*). During the deposition petitioner also "asked numerous questions regarding purported violations of restaurant policies" which, the Board found, was "an obvious maneuver to establish a defense" to the Board's unfair labor practice complaint (Pet. App. A-43).[23] As the court of appeals concluded, "[t]hese circumstances, in the context of other unfair labor practices which the Board found, clearly permit a finding that the lawsuit was prompted by an improper motive" (*id.* at A-12).

In addition to its reliance on the various circumstances surrounding petitioner's filing and prosecution of the civil suit, the Board found that petitioner had shown no reasonable basis for the suit, and concluded that this fact supported the ultimate finding that the suit had been filed for the purpose of retaliation against the employees. The Board did not conduct a trial on the merits of the suit or weigh the available evidence to determine who was likely to prevail on the merits; instead, it gave petitioner an opportunity to produce evidence that would indicate that it had some reason for its suit other than retaliation.

---

[23] The court of appeals did not consider whether the taking of the deposition violated Section 8(a)(1), as the Board had found, because it concluded that the filing of the suit alone was a violation (Pet. App. A-11 to A-12 n.2). However, the court did not disturb the Board's finding that the interrogation of the former waitress on the basis of information obtained in the deposition was a violation of Section 8(a)(1) and (4) (Pet. App. A-38). Moreover, the court agreed with the Board (*id.* at A-11 n.2) that the deposition "had a chilling effect on Helton and the other picketers [and] * * * also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings."

But petitioner was unable to make this minimal showing. As the court of appeals noted (Pet. App. A-10), petitioner's allegations of mass picketing, trespass, blocking of entrances and danger to the public were "totally unsubstantiated." [24] The court also pointed out that petitioner produced "no evidence" to show that the employees made the statements in the leaflet with reckless disregard for their truth or falsity, which would have been necessary to prove libel in the context of a labor dispute. Moreover, as the Board found, all of the allegations made by the employees in the leaflet were true. See pages 9-10, note 10, *supra*. Thus, the Board was not presented with a close case, but with a complete absence of evidence that petitioner had any reasonable basis for its suit. In those circumstances, and in light of the other evidence of petitioner's retaliatory motive, the Board's determination that the filing of the suit constituted an unfair labor practice was clearly correct.

Petitioner argues that the Board lacked the authority to rely in part on its finding that there was no reasonable basis in fact for petitioner's suit to support its determination that the suit had been brought for the purpose of retaliation.[25] Petitioner appears to concede (Pet. Br. 15) that the Board has authority to proscribe as an unfair labor practice, and restrain, a state court suit "where the object of the litigation was itself unlawful." However, it contends (*ibid.*) that the Board can do so only in cases in which an unlawful objective is apparent from the "declared objective for suit, as stated in the complaint."

---

[24] The evidence showed that the picketing was peaceful, involved no more than six or seven adults and two children, took place on the public sidewalk, and did not block access to the Restaurant. See page 9, *supra*. Petitioner never explained how it could reasonably have believed that mass picketing would result from picketing by four waitresses and their immediate families.

[25] Petitioner did not challenge in its petition the Board's finding, upheld by the court of appeals, that its civil suit did not have a reasonable basis in fact. Accordingly, that issue is not before the Court.

Otherwise, petitioner suggests (*id.* at 16), the Board improperly intrudes into areas reserved for resolution by state courts.

It was proper for the Board to look beyond the face of the complaint itself in determining that petitioner's suit lacked a reasonable basis in fact. Otherwise, as the court of appeals observed, "a carefully drawn complaint" could readily be used "to avoid a finding that a lawsuit lacks a reasonable basis" (Pet. App. A-11). Moreover, this Court has made clear that the Board may determine issues that are ordinarily determinable by courts when such determination is necessary to the decision whether an unfair labor practice has been committed. See *NLRB* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-361 (1969); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 428 (1967). See also *Angle* v. *NLRB*, *supra*, 683 F.2d at 1300 n.2. The Board's inquiry whether there was a reasonable basis in fact for the filing of a civil suit is not an unusual one; as suggested above, it is the same sort of inquiry that is made in an antitrust case in order to determine whether an earlier state or federal action was filed in an effort to win a favorable judgment or merely to harass defendants. In any event, it hardly constitutes a usurpation of state court functions for the Board to take into account a complete lack of evidentiary foundation in determining that a suit was brought for the purpose of retaliation against employees for their exercise of federally protected rights.

Petitioner also appears to acknowledge (Pet. Br. 13) that the Board could find unlawful and restrain a suit involving a state cause of action that is "based upon or would restrict employee access to the Board." However, it alleges that its suit, unlike those at issue in *Power Systems, Inc.* v. *NLRB*, *supra*, and *United Credit Bureau of America* v. *NLRB*, *supra*, is not "premised on employee resort to NLRB procedures," but rather upon "conduct *unrelated* to Board proceedings and well within the spectrum of situations [e.g., libel and mass picketing] historically recognized by this Court as appropriate for state court resolution" (Pet. Br. 16; emphasis in original).

But the Board found that the filing of petitioner's suit itself was intended to constitute retaliation for the employees' exercise of protected rights, including Helton's filing of an unfair labor practice charge with the Board, regardless of what allegations were contained in the complaint. Thus, there is little reason to differentiate petitioner's suit from those that petitioner agrees could properly be made the subject of an unfair labor practice proceeding. The Board properly concluded that petitioner's filing of the civil suit was intended to discourage, *inter alia*, employee access to the Board and thereby constituted an unfair labor practice.

D. Decisions of This Court Concerning Preemption Do Not Preclude the Board From Finding That Filing of a Civil Suit in Bad Faith Constitutes an Unfair Labor Practice

Petitioner argues that the Board is precluded from finding that bad faith filing of certain types of suits constitutes an unfair labor practice because of several decisions in which the Court concluded that such suits are not preempted by the national labor laws. None of the cases that petitioner cites involved a suit that was alleged to have been filed for the purpose of retaliation for protected conduct. For this and other reasons, they do not govern the issue now before this Court.

1. In *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the Court held that a civil libel action brought by a supervisor against a union for allegedly false statements contained in a leaflet was not preempted by the national labor laws. However, the Court concluded that, "[i]n order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy," state remedies for libel arising in the context of a labor dispute must be limited to cases in which the plaintiff can show that the statements at issue were made with knowledge of their falsity or with reckless disregard of the truth and resulted in actual injury (*id.* at 64-65). These limi-

tations were designed to ensure that the state law of defamation would not "dampen the ardor of labor debate" by permitting parties to a labor dispute to use libel suits "as weapons of economic coercion" (*id.* at 64). The Court prescribed similar limitations on actions for intentional infliction of emotional distress that arise in a labor context in *Farmer* v. *United Brotherhood of Carpenters & Joiners, Local 25*, 430 U.S. 290, 305-306 (1977).

Petitioner argues that *Linn* and *Carpenters* stand for the proposition that the Board may not interfere with state court actions involving claims of libel and intentional infliction of emotional distress. The two cases do suggest that such claims normally will be filed and adjudicated in state court. But the Court in both cases articulated concerns that are relevant to suits brought in good faith to vindicate the interest underlying the particular state cause of action. The cases do not indicate that the Board could not restrain the prosecution of a suit that it finds to have been brought, not to vindicate such legitimate interests, but for purposes of retaliation for the exercise of federally protected rights. As discussed above, the " 'overriding state interest' " (383 U.S. at 61) in protecting residents from malicious libels is not great in the case of a suit that is brought in bad faith.

The court below did not suggest that the Board would displace state courts in deciding the merits of the state causes of action addressed in *Linn* and *Carpenters*. It held merely that the Board may find that an unfair labor practice has been committed in cases in which the state court claim is not even colorable and is brought in bad faith and in furtherance of an unlawful objective (Pet. App. A-9 to A-11). This is not the same issue that is decided by the state court. As the court of appeals stated (*id.* at A-10), "an employer who brings a good faith action against employees * * * and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits." Thus, the Board in this case

ordered petitioner to withdraw its civil suit only because the evidence showed that the suit was brought for the purpose of retaliation. That evidence included (but was not limited to) the complete lack of any showing of a reasonable basis in fact for the claims that were made (*id.* at A-10 to A-11). If the Board concludes that a suit was not brought for the purpose of retaliation, and thus was not an unfair labor practice, the state court could then proceed to determine the merits of the claim, applying the standards set forth in *Linn* or *Carpenters*. But those cases do not suggest that a plaintiff is entitled to have a state court hear and decide a suit that has been filed and prosecuted for a purpose that violates the National Labor Relations Act, or that the Board has no authority to provide a remedy in such a case.[26]

2. Petitioner's reliance (Pet. Br. 12, 19, 21, 29) on *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), is similarly misplaced. In *Sears*, this Court held that the National Labor Relations Act did not preclude a state court from entertaining a trespass claim arising out of union picketing on an employer's premises in a case in which the union had not filed a charge with the Board, so that there was no other forum in which the underlying question of labor law could be adjudicated (*id.* at 185-187, 202, 203 n.34). The Court concluded that state court jurisdiction in such a case would not create an undue risk of interference with the Board's jurisdiction or with protected activity by the union (*id.* at 198, 205). The present case, unlike *Sears*,

---

[26] Petitioner's contentions (Pet. Br. 17-18, 23-29) that it is entitled to a jury trial in order to establish its libel claim and that the Board is incapable of providing a remedy for libel are simply irrelevant. The Board did not determine the merits of petitioner's claim, but determined only that it was insubstantial and a sham, because filed merely for the purpose of retaliating against employees for exercising rights protected under the Act, and not to vindicate any right under State law. Since petitioner apparently does not dispute that determination of the Board, it is not clear why it is concerned with the right to a jury trial and availability of a remedy for libel.

arose on petition for review of the Board's order and a cross-application for enforcement of that order. Moreover, the question of preemption that was at issue in *Sears* does not affect the Board's authority in this case, and the Board was not required to conclude that the National Labor Relations Act divested the state court of jurisdiction of the subject matter of petitioner's suit. Rather, the Board found that petitioner's suit constituted unlawful restraint against Helton and the other defendants based upon their exercise of rights protected by the Act, and the Board ordered petitioner to terminate the suit for that reason alone. As the court of appeals observed, the Board had the power to take this action "[w]hether or not the state court's jurisdiction [was] technically preempted" (Pet. App. A-13). Thus, the decision in this case does not depend upon the question of preemption that was at issue in *Sears*.

Even if the *Sears* preemption analysis were applicable, it is fully consistent with the decision below. In *Sears*, the Court recognized (436 U.S. at 202) that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or [to] the NLRB, it must be presented to the Board." The Court concluded, however, that this rationale did not provide a sufficient basis for preempting state court jurisdiction "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so" (*id.* at 202-203; footnote omitted). Here, the Board's processes were invoked, and it was alleged that petitioner had filed its civil suit in retaliation for protected conduct by its employees; the Board took evidence concerning that allegation and found that petitioner's suit was groundless and was filed solely in retaliation for the protected conduct of the employees. In these circumstances, nothing in *Sears* suggests that petitioner should be free to go forward with a baseless retaliatory suit. Otherwise, the decision

in *Sears*, which rested on a perceived gap in the remedies available under the National Labor Relations Act (436 U.S. at 202), would prevent the Board from affording relief for demonstrated violations of that Act—a result that could hardly have been intended by the Court.

II. SECTION 2283 (28 U.S.C.) DOES NOT PRECLUDE THE BOARD FROM ORDERING PETITIONER TO DISMISS ITS CIVIL SUIT

Section 2283 (28 U.S.C.) provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." In *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), this Court held that Section 2283 does not bar the Board from obtaining a federal court injunction restraining enforcement of a state court injunction against picketing protected by Section 7 of the National Labor Relations Act. The Court noted (404 U.S. at 146) that the "purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." Following its decision in *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957), that the restrictions of Section 2283 do not apply to the United States, the Court concluded that those restrictions were likewise inapplicable to the Board when it acts to vindicate "superior federal interests" (404 U.S. at 146).[27] See also *Mitchum* v. *Foster*, 407 U.S. 225, 235-236 (1972). On two separate occasions since *Nash-Finch* was decided, this Court has upheld Board orders requir-

[27] The Court distinguished *Amalgamated Clothing Workers* v. *Richman Brothers Co.*, 348 U.S. 511 (1955), and *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) (see Pet. Br. 36-37, and *United Credit Bureau of America* v. *NLRB*, *supra*, 454 U.S. at 998 (Rehnquist, J., dissenting from denial of certiorari)), on the ground that in those cases the injunction against state court proceedings was sought by "a *private party*." *NLRB* v. *Nash-Finch Co.*, *supra*, 404 U.S. at 145 n.3 (emphasis in original).

ing unions to cease pursuing civil suits to collect fines imposed in violation of the Act, without even questioning whether such orders might be barred by Section 2283. *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers* v. *NLRB, supra*, 412 U.S. at 85, 87; *NLRB* v. *Granite State Joint Board, Textile Workers Union, Local 1029, supra*, 409 U.S. at 214-215.

Petitioner contends (Pet. Br. 38-39) that *Nash-Finch* is not controlling because there the state court had enjoined picketing that was governed solely by the Act, whereas here the state court had jurisdiction to redress libel and mass picketing. However, the principle on which the *Nash-Finch* holding rests is not limited to a situation in which the state court suit involves an area preempted by federal law. The principle encompasses any situation in which a state court suit threatens to abridge "federal rights" the United States or one of its agencies is entrusted with protecting; in such cases, Section 2283 does not bar the federal government from invoking the aid of a federal court to enjoin the state court proceeding.

This is the very situation in this case. The Board found that petitioner had restrained its employees in the exercise of their rights to file charges with the Board and to engage in other activity protected by Section 7 of the Act, and thereby violated Section 8(a)(1) and (4) of the Act. The Board found that petitioner had accomplished this restraint by filing its state court suit, not for the purpose of recovering for the alleged injury, but in order to retaliate against the employees for engaging in protected activity and to discourage them from the future exercise of protected rights. In these circumstances, the Board, in seeking court of appeals enforcement of its order directing petitioner to withdraw its state court suit,[28] was attempting to vindicate "federal

[28] A Board order is, of course, not self-enforcing. It has compulsive force only after it has been reviewed and enforced by a federal court of appeals.

rights" that the Act had entrusted to its protection. See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940) (Board is chosen as "instrument to assure protection from the [conduct described in the Act]"). As the court of appeals noted (Pet. App. A-12), "the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit." [29]

Petitioner further contends (Pet. Br. 39; see also Justice Rehnquist's dissent from denial of certiorari in *United Credit Bureau of America* v. *NLRB*, *supra*, 454 U.S. at 998-999) that here, unlike in *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954),[30] it could not be found

---

[29] Petitioner concedes (Pet. Br. 39 n.31) that, under *Nash-Finch*, "the Board may have authority to restrain state court actions which interfere with its proceedings in violation of Section 8(a)(4) of the Act." However, it contends that, since the Board found that management's threats on the first day of the picketing violated Section 8(a)(1), but not Section 8(a)(4), of the Act (see page 8, *supra*), the court of appeals improperly relied on those threats as evidence that petitioner's motivation in filing its suit was to penalize employees for participating in proceedings before the Board. Even if the threats themselves were only directed to the picketing activity, they could serve as evidence that the subsequent suit was filed for the purpose of retaliation. There is other evidence that supports the Board's finding that the suit was filed to retaliate against Helton for filing charges with the Board and to interfere with the Board's processes. See pages 8-10, 35-37, *supra*. Moreover, Section 2283 would not bar an injunction even if the filing of the state court suit merely constituted a violation of Section 8(a)(1) of the Act, and there is ample evidence to support the Board's Section 8(a)(1) finding (see pages 8-10, 35-37, *supra*).

[30] In *Capital Service*, this Court held that a federal district court properly granted the Board's request to enjoin an employer from enforcing a state court injunction against picketing in a case in which the picketing was also the subject of an unfair labor practice complaint pending before the Board. The Court stated (347 U.S. at 505, quoting 28 U.S.C. 2283) that, since the district court had authority to enjoin the picketing at the Board's request, the district court's order restraining enforcement of the state court injunction

that enjoining the state court proceedings was "necessary in aid of [the Board's] jurisdiction," because "the subject matter of the state lawsuit—libel, trespass, and improper interference with business—was neither pending before the Board nor subject to its jurisdiction" (Pet. Br. 39). However, a finding that the injunction was "necessary in aid of its jurisdiction" (the third exception to the prohibition of Section 2283) would be required only if Section 2283 were applicable to the Board's request for injunctive relief. *Nash-Finch*, decided since *Capital Service*, holds that Section 2283 is inapplicable to such a Board request. In any event, petitioner's argument that the subject matter of the state court suit was neither "pending before the Board nor subject to its jurisdiction" (Pet. Br. 39) is merely a reiteration of its assertion that the Board was precluded from looking behind the state court complaint and considering the totality of the evidence in determining whether filing of the civil suit constituted an unfair labor practice. Since, as part of that determination, the Board had the authority to make at least the threshold inquiry whether petitioner possessed a reasonable basis in fact for its suit, the subject matter of the suit was, of course, "pending before the Board [and] subject to its jurisdiction." [31]

---

was " 'necessary in aid of its jurisdiction' and thus permitted under the exceptions specifically allowed by Congress."

[31] Moreover, even if this Court had interpreted Section 2283 to extend to action by federal agencies, there can be little doubt that enforcement of the Board's order would have come within the exception for injunctions "expressly authorized by Act of Congress." Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e), provides for enforcement by the courts of appeals of orders issued by the Board after it has found an unfair labor practice, as it did in this case. See *Mitchum* v. *Foster*, *supra*, 407 U.S. at 233-234 (citing recognition that exception must be made to ban on injunctions against state proceedings "if the import and purpose of other Acts of Congress were to be given their intended scope"); *NLRB* v. *Nash-Finch Co.*, *supra*, 404 U.S. at 152-153 (White, J., dissenting) (citing powers of Board and courts to issue injunctions in connection with enforcement of Board orders after unfair labor

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CANDACE M. CARROLL
Attorney

National Labor Relations Board

JANUARY 1983

---

practices have been adjudicated by the Board). Unlike the present case, none of the cases cited by petitioner involved enforcement of a Board order following a Board finding that filing of a state court action constituted an unfair labor practice in violation of the National Labor Relations Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 397357 1272

Office-Supreme Court, U.S.
FILED
MAR 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

LAWRENCE ALLEN KATZ
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999

Counsel for Petitioner

Of Counsel:

N. GREGORY SMITH
SUSAN GAYLORD GALE

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE BOARD'S DETERMINATION OF A CIVIL ACTION'S "REASONABLENESS" USURPS THE FUNCTION OF THE STATE COURTS.	1
II. THIS CASE PRESENTS NO BASIS FOR INTERFERENCE WITH THE RESTAURANT'S CONSTITUTIONAL RIGHT TO PETITION THE JUDICIARY.	8
A. The Exception for "Harassing And Sham State Court Proceedings Of A Repetitive Nature" Does Not Apply Here.	9
B. The Exception For "State Proceedings Motivated By A Desire To Harass" Does Not Apply Here.	11
C. The Exception For Conduct That Constitutes An Abuse Of Process Does Not Apply Here.	13
III. THE BOARD'S REQUEST FOR A GENERAL EXEMPTION FROM THE ANTI-INJUNCTION ACT IS NOT SUPPORTED BY THE ACT OR BY LEGAL PRECEDENT.	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	PAGE
Alexander v. Unification Church of America, 634 F.2d 673 (2d Cir. 1980)	13
Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511 (1955)	16
Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	16
Blue Goose Growers, Inc. v. Yuma Groves, Inc., 641 F.2d 695 (9th Cir. 1981)	13, 14
Booster Lodge 405, IAMAW v. NLRB, 412 U.S. 84 (1973)	17
Bowles v. Willingham, 321 U.S. 503 (1944)	16
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	9, 10, 11
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	7
Clayton v. International Union, 451 U.S. 679 (1981)	7
Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252 (9th Cir. 1982)	10
Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972)	12
Dombrowski v. Pfister, 380 U.S. 479 (1965)	11, 12, 13
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	9
Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977)	2, 3, 16, 17, 18
Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)	10
Hicks v. Miranda, 422 U.S. 332 (1975)	15
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	7, 11, 12, 13
International Organization of Masters, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978)	10, 17
Juidice v. Vail, 430 U.S. 327 (1977)	13
Kugler v. Helfant, 421 U.S. 117 (1975)	12

Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957) 16

Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) 2, 3, 5, 6, 12, 16, 17, 18

Lodge 743, IAMAW v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976) 14

Mitchum v. Foster, 407 U.S. 225 (1972) 18

Moore v. Sims, 442 U.S. 415 (1979) 12, 13

NLRB v. Boeing Co., 412 U.S. 67 (1973) 7, 8

NLRB v. Granite State Joint Board, 409 U.S. 213 (1972) 8, 17

NLRB v. Local 1229, IBEW, 346 U.S. 464 (1953) 3

NLRB v. Nash-Finch Co., 404 U.S. 138 (1971) 8, 15, 16

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 15

Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974) 3

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 9

Power Systems, Inc., 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979) 4, 11

S. E. Nichols Marcy Corp., 229 N.L.R.B. 75 (1977) 12, 14

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978) 7

Sumner v. Mata, 449 U.S. 539 (1981) 7

United Credit Bureau of America, Inc. v. NLRB, 643 F.2d 1017 (4th Cir.), *cert. denied*, 454 U.S. 994 (1981) 8

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 9, 16, 17, 18

Younger v. Harris, 401 U.S. 37 (1971) 8, 11, 12, 13

Constitutional Provisions

U.S. Const. amend. I 9, 11

Statutes

15 U.S.C. § 1 (1973) 9

28 U.S.C. § 2283 (1976) 15, 16, 17, 18

29 U.S.C. § 151 *et seq.* (1976) 2
29 U.S.C. § 160(e)(1976) 18
42 U.S.C. § 1983 (1981) 18

Miscellaneous

W. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 14

No. 81-2257

In The

Supreme Court of the United States

October Term, 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE BOARD'S DETERMINATION OF A CIVIL ACTION'S "REASONABLENESS" USURPS THE FUNCTION OF THE STATE COURTS.

The brief filed by the National Labor Relations Board ("NLRB," or "the Board") seems, at many points, to be structured as if the issue in this case were whether an employer is entitled to maintain a civil lawsuit against his employees when that suit, though ostensibly seeking lawful objectives, is in fact insubstantial and retaliatory. That, we submit, is *not* the issue in this case. Instead, the real issue is which *forum* — the Board or the court in which the suit was filed — shall have jurisdiction to determine the factual and

legal sufficiency of the suit and the proper remedy for an infringement of rights caused by the suit. As to that issue, petitioner submits that precedent and reason consign such a determination to the civil court.

The Board argues, at great length, that it must have the power to evaluate the factual basis and the underlying motivation for an employer's civil litigation, and to order withdrawal of groundless, retaliatory suits, because, in the absence of such power, employees will be burdened with the cost and effort of defense. [NLRB Brief, pp. 24-29.][1] The Board further contends that "it is especially important" that it be able to proscribe such suits "in order to preserve an atmosphere in which employees are not discouraged from, and punished for, the exercise of protected activity." [*Id.* at 25.] These arguments, we submit, run counter to this Court's landmark decisions in *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), and in *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290 (1977), which held that the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1976), does not preempt state court jurisdiction over suits for tortious conduct occurring during a labor dispute.

The Board contends that *Linn* and *Farmer* do not assist the Restaurant because neither case involved "a suit that was alleged to have been filed for the purpose of retaliation for protected conduct." [NLRB Brief, p. 39.] While acknowledging that, under *Linn* and *Farmer*, state tort claims "normally will be filed and adjudicated in state court" [*id.* at 40], the Board asserts that those holdings do not prevent the NLRB from making a threshold determination regarding motivation and from screening out retaliatory suits *before* judicial review. [*Id.* at 40-41.] Petitioner believes that the Board's adoption of this screening function, insofar as it requires the civil plaintiff to demonstrate the merits of his suit to the Board, essentially

---

[1] The Board's answering brief shall be cited as "NLRB Brief." The parties' consecutively-paginated Joint Appendix shall be cited as "Jt. App." The Appendix to the Petition for a Writ of Certiorari, containing the decisions of the Administrative Law Judge ("ALJ"), the NLRB, and the Court of Appeals, shall be cited as "Pet. App." The documents included in the Appendix to Petitioner's Brief shall be cited as "Br. App." References to the transcript of hearing before the ALJ, where not found in the Joint Appendix, shall appear as "Tr."

nullifies *Linn* and *Farmer* and contravenes the principles of federalism upon which those decisions were based.

In the *Linn* case, this Court fully recognized the possibility that employers might bring libel suits for coercive or retaliatory purposes. Employers could, the Court observed, use such suits to "truncate the free discussion envisioned by the Act." 383 U.S. at 64. Or they might use such suits "as weapons of economic coercion." *Id.* However, in light of the "deeply rooted" state interest in resolving libel claims [*id.* at *62*], the inability of the NLRB to provide relief to employers faced with tortious conduct, and the importance of preserving access to the judiciary, this Court concluded that libel claims arising out of labor disputes were not preempted by the NLRA. In order to guard against the "abuse of libel actions" [*id.* at 65], the Court did prescribe a screening function, but it was a function to be performed by the state court, not by the NLRB. Thus, the Court ruled that an employer's libel suit could not succeed unless it proved (1) that the defamatory statement had been circulated with malice,[2] and (2) that actual harm had resulted from the defamation. In addition, the Court cautioned trial judges to be vigilant against excessive damage awards. [*Id.* at 64-66.] An equivalent accommodation was reached in the *Farmer* case, which dealt with a civil action for intentional infliction of emotional distress. *See* 430 U.S. at 305-06.

It is apparent, both from the Board's current arguments and from its actual procedures in this case, that any NLRB effort to

---

[2] In *Linn*, the Court applied a malice standard requiring knowledge of falsehood or reckless disregard of truth or falsity (383 U.S. at 65), because it recognized that labor disputes are "frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* at 58. Indeed, eight years after *Linn*, in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), the Court ruled that the word "scab" was not defamatory under the NLRA. In the present case, however, the alleged defamation was not the sort of abusive or insulting language commonly heard during labor disputes. The accusations by past and present employees that the Restaurant's restrooms were "filthy" and its waitresses sexually harassed were calculated to jeopardize the Restaurant's business and its image in the community, rather than merely to criticize its management. Challenging such accusations in court could hardly be viewed as unreasonable. *See NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953).

determine whether a civil tort suit is retaliatory will necessitate a preliminary trial of the merits of the tort claim. Otherwise, the Board could not determine whether the claim is "colorable" or has a "reasonable basis in fact."[3] [See NLRB Brief, pp. 40-41.] And that determination, in a case such as the one at bar, requires an application of *state* law to the facts, a function which the *state court* would perform if the tort claim were processed without NLRB interruption. Thus, the Board is actually espousing a threshold substitution of its own judgment on state law for that of the state court.

There are several reasons to repudiate the Board's proposed procedure. In the first place, the Board is not as well qualified as the state court to determine the factual sufficiency of a civil tort claim, and a program of threshold factual inquiry by the Board poses a greater likelihood of faulty decisions. Second, even if the Board's lack of expertise were not a problem, its procedures would be. Under the Board's usual rules, the "reasonable basis" determination would have to be made in the absence of employer discovery. Thus, in the case of a libel claim, the Board's procedures would deny the employer a meaningful opportunity to investigate state-of-mind facts relevant to the critical issue of malice, enhancing the possibility of an NLRB order that the suit be withdrawn. The threshold analysis by the Board would thus be the only adjudication ever made of the suit's merits. Accordingly, the Restaurant's concerns about being deprived of a jury trial are not, as the Board contends, "irrelevant." [NLRB Brief, p. 41, n.26.] Even if an employer's suit managed to survive Board scrutiny, considerable cost and delay would have been incurred, and the employer's success before the Board would mean

---

[3] Although the Board's ALJ did state that two "threats" by Restaurant managers were also "significant factors" in determining the motive for the civil suit, the entire tenor of his discussion makes it evident that his finding of "no reasonable basis" to the suit was the primary factor in his finding that the motive for suit had to be unlawful. [See Pet. App. A-40 to A-42; see also NLRB Brief, p. 36.] The NLRB's willingness to infer an unlawful motive for civil litigation when a suit lacks a "reasonable factual basis" is further demonstrated by its decision in *Power Systems, Inc.*, 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). In that case, the Board stated: "*Since* we have found that the Respondent had no reasonable basis for the filing of its lawsuit, *we conclude* that the lawsuit had as its purpose the unlawful objective of penalizing Sanford for filing a charge with the Board. . . ." *Id.* at 450 (emphasis added).

only that he had won the right to proceed with his interrupted state lawsuit. Furthermore, to the extent that NLRB intervention impedes the employer from obtaining preliminary injunctive relief against tortious conduct, it could promote the kinds of confrontation and violence that this Court sought to discourage in *Linn*. *See* 383 U.S. at 64 n.6. Accordingly, there is little to recommend the screening function now sought by the Board.

The Board does not, of course, concede that its preliminary screening of employer litigation will require it to perform factual or legal analyses reserved to the state court. In the present case, the Board insists that it "did not attempt to adjudicate the merits of the state court suit . . ." [NLRB Brief, pp. 16, 36.] Indeed, argues the Board, no such adjudication was necessary, because in this case there was "a complete absence of evidence that petitioner had any reasonable basis for its suit." [*Id.* at 37.] In other sections of its Brief, the Board persistently cites the "complete lack of evidentiary foundation" for the Restaurant's suit [*id.* at 38], and suggests that the state court claims were "not even colorable." [*Id.* at 40.]

The record, however, does not support the Board's contentions on this subject. The Administrative Law Judge ("ALJ") admitted substantial evidence on the issues raised by the Restaurant's suit, and he purported to evaluate that evidence in reaching his conclusion that the suit had "no reasonable basis in fact."[4] He engaged in a "close examination" of the statements on the allegedly libelous leaflet and concluded that the "evidence establishes the truthfulness

---

[4] The ALJ had before him, among other things, the objectionable leaflet itself [Jt. App. 2], the verified state court complaint [*id.* at 3-9], the direct testimony of one of the owners of the Restaurant that the accusation of a "filthy restroom" was "a lie" [*id.* at 109], testimony from the demonstrators themselves indicating that they made such an accusation with little regard for the truth [*e.g.*, *id.* at 128-29, 138-39], testimony indicating that the claim of "unwarranted sexual advances" was a reckless exaggeration of minor and long-forgotten incidents [*e.g.*, *id.* at 130-31, 133-34, 137-38, 140-43, 152-54], and testimony from both demonstrators and managers that traffic on the Restaurant's driveways had been temporarily blocked or slowed [*id.* at 76-77, 83, 96-101, 106-07], that at least one customer had been insulted [*id.* at 78], and that other protesters were expected to join the original group [*id.* at 71]. Accordingly, the NLRB's claim that the ALJ was faced with "a complete lack of evidentiary foundation" for the Restaurant's suit [NLRB Brief, p. 38] is an unfair characterization of the record.

of all six 'waitresses' complaints' listed in the leaflet." [Pet. App. A-40 to A-41.] With respect to the Restaurant's claim that other defamatory statements had been uttered, the ALJ ruled that "the record contains no evidence capable of such a construction." [*Id.* at A-41.] Regarding the Restaurant's claim that the protesters improperly interfered with its business and customers, the ALJ held that "the evidence fails to support any of these contentions." [*Id.*] Thus, the ALJ performed the very same function that the Restaurant had asked the state court to perform when it filed its complaint, that is, to determine whether, on the evidence, the demonstrators' oral and written statements were defamatory and whether the picketers' conduct had exceeded permissible boundaries.[5] In effect, the NLRB *tried* the Restaurant's civil suit in order to make a *threshold* determination that it lacked a reasonable basis.

Even if the Court were to accept the Board's argument that it is entitled to make some kind of threshold determination of reasonableness, that is clearly *not* what the Board did in this case. A true "threshold" analysis would have been completed after finding that the civil lawsuit had "a lawful objective on its face" [Pet. App. at A-10], and that the outcome of the action would depend upon factual determinations and the application of state law to the facts. At that point, the Board should have deferred to the state court because the Restaurant's suit raised issues "deeply rooted in local feeling and responsibility." *Linn*, 383 U.S. at 62. The Board argues that "there is little reason for deference to state courts" in the case of insubstantial and retaliatory suits. [NLRB Brief, p. 14.] But this

---

[5] In its answering brief, the Board states that the questions presented for review by this Court do not include a challenge to the Board's finding that the Restaurant's civil suit lacked a "reasonable factual basis" and was filed for retaliatory purposes. [NLRB Brief, pp. 13, 37 n.25.] The Restaurant does disagree with the Board's finding, but the Restaurant's primary position is that the NLRB is *without jurisdiction* to analyze the factual basis and the underlying motivation for a civil tort action that, on its face, seeks a lawful objective and that is not part of a larger pattern of unlawful conduct. Moreover, in analyzing the validity of the Board's "reasonable basis" test, this Court should not ignore the manner in which that test was applied in the instant case, resulting in the Board's ruling that a restaurant was barred from judicially challenging public statements that its employee restrooms were "filthy . . . with no soap, paper towels or toilet tissue provided." [Jt. App. 2.] Such a ruling demonstrates that the Board, under the guise of applying a "reasonable basis" test, is actually placing a far greater burden upon the civil plaintiff.

argument *assumes* the issue in dispute; that is, which forum shall determine whether a suit is insubstantial or retaliatory? Under *Linn*, and basic principles of federalism and comity, the deference that the NLRB must accord to the state judiciary with respect to matters of local concern, such as claims of tortious conduct, is not a function of the substantive merit or the motive underlying the litigation. After all, the state court's interest in protecting its citizens from insubstantial or retaliatory suits is just as great as its interest in the success of meritorious claims.

The Board's insistence that "the machinery of the state court system" cannot adequately protect the federally-created rights of employees, nor provide remedies for infringement of these rights [NLRB Brief, p. 26], sounds a theme that has been frequently rejected by this Court. *See, e.g., Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978); *NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962). *See also Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975). The Board's reliance upon *Clayton v. International Union*, 451 U.S. 679 (1981) [NLRB Brief, p. 26], is misplaced, because there the Court refused to require exhaustion of procedures that were demonstrably futile. In the present case, there is no reason to doubt the ability of the judicial machinery of the State of Arizona to fully and effectively protect the demonstrators from an insubstantial or retaliatory lawsuit and, therefore, from any infringement upon their federal rights. In this context, it is significant that the Board has not criticized the scope of the temporary restraining order signed by the trial court, the rulings rendered on the parties' cross-motions for summary judgment, nor any of the other orders issued by that court.

The Board argues that the defendants' cost of defending the state litigation may be substantial, and that, even if the defendants are successful in state court, "they probably would not receive attorneys' fees." [NLRB Brief, p. 26 n.19.] However, the Board does acknowledge the existence of an Arizona statute providing attorneys' fees to the prevailing party "upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless [and] not made in good faith." [*Id.*] Apparently the Board believes that the state court will "probably" not agree with the Board's findings regarding the nature of the Restaurant's suit. Perhaps the Board is correct in that perception. If so, it simply highlights

the deficiencies in the Board's position. Once again, it becomes clear that the real issue is which forum should determine the reasonableness of the suit, the propriety of the motives for bringing the suit, and the remedy for a groundless suit. We submit that such matters are properly resolved only by state trial courts, which are more accustomed to evaluating them in "varying factual contexts than . . . is . . . a specialized agency." *NLRB v. Boeing Co.*, 412 U.S. 67, 76-77 (1973).

II. THIS CASE PRESENTS NO BASIS FOR INTERFERENCE WITH THE RESTAURANT'S CONSTITUTIONAL RIGHT TO PETITION THE JUDICIARY.

In the case at bar, the Restaurant does not challenge the Board's jurisdiction to find an unfair labor practice, and to issue an appropriate cease-and-desist order, when the complaint in a civil action seeks an unlawful objective on its face, or is preempted by the NLRA. *See, e.g., NLRB v. Granite State Joint Board,* 409 U.S. 213 (1972); *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971); *United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d 1017 (4th Cir.), *cert. denied,* 454 U.S. 994 (1981). Unlike that line of cases, however, in which a superior federal interest is present, the instant case involves a lawsuit that is not preempted by the NLRA [Pet. App. A-12, A-48], and that does have "a lawful objective on its face." [Pet. App. A-10.] Nevertheless, the Board now claims the right even in such cases to make a threshold inquiry regarding the plaintiff's good faith, including an analysis of whether there is a reasonable basis in fact for the allegations in the civil complaint, and to order the litigation withdrawn if the suit fails to survive such scrutiny. Granting the Board such authority, we are told, would be entirely consistent with those extremely rare cases in which this Court has recognized exceptions to the well-established doctrine prohibiting federal interference with state court litigation. *See Younger v. Harris,* 401 U.S. 37 (1971). [NLRB Brief, pp. 30-35.] Petitioner submits that the present case is not at all similar to those exceptional cases, and that the state's interest in controlling tort litigation arising out of a labor dispute is far superior to the Board's interest in evaluating the substance and motive for such litigation.

A. The Exception For "Harassing And Sham State Court Proceedings Of A Repetitive Nature" Does Not Apply Here.

The Board argues that the legal principles that it applied in ordering cessation of the Restaurant's civil litigation are similar to principles established by this Court in antitrust cases such as *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). But the analogy does not succeed. In *Noerr*, the Court held that Section 1 of the Sherman Act, 15 U.S.C. § 1 (1973), does not bar joint efforts to obtain anticompetitive legislation. The Court did suggest, however, that a violation of the Act might be found when such efforts are "a mere sham" to camouflage direct interference with a competitor's business relationships. 365 U.S. at 144. In *California Motor Transport*, the Court held that an egregious pattern of anticompetitive activities, including litigation, warranted a limited departure from the general rule that the First Amendment right to petition the judiciary is not rendered invalid by the plaintiff's desire to obtain a business advantage. The unique circumstances that led to the Court's decision included allegations that the members of a trade group had conspired "to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, [and] to defeat that right by massive, concerted, and purposeful activities." 404 U.S. at 515. The following year, the Court stated that *California Motor Transport* was applicable where there are "repetitive lawsuits carrying the hallmark of insubstantial claims." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973). Four years thereafter, a majority of the Justices construed *California Motor Transport* as holding that "harassing and sham state court proceedings of a repetitive nature," or a "pattern of baseless, repetitive claims," could constitute an antitrust violation. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6, 644 (1977). Significantly, the question of whether such circumstances would justify a federal court injunction against pending state court proceedings, which was not addressed in *California Motor Transport*, produced substantial disagreement in *Vendo*.

Exceptions to general constitutional doctrines must be very narrowly construed. The case presently before the Court does not involve a denial of "free and unlimited access" to any agency or court, does not involve "massive activities," and does not involve

a "pattern of baseless, repetitive claims." Rather, this case involves a single, garden-variety civil action for obstruction, trespass, and libel occurring during a labor dispute. Absent from this case is any evidence that the Restaurant utilized its civil litigation in some extraordinary fashion to harass the defendants, to cause them unreasonable expense, or to impose unusual burdens upon them.[6]

It is also significant that the Restaurant obtained judicial rulings supporting its legal position — the Restaurant's application for a temporary restraining order was granted, after a hearing; defendants' counterclaim for abuse of process was dismissed; and defendants' motion for summary judgment on the Restaurant's libel claim was denied. [Jt. App. 19-22, 94-95; Br. App. "D".] *Compare Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) ("particularly hard" to characterize successful action as "baseless" or "frivolous"), *with Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1267 (9th Cir. 1982) (tariff bureau's denial of all of defendants' claims demonstrates "baselessness" of claims). We submit that the right of a single employer to file a single lawsuit alleging that a group of protesters has committed or has threatened tortious acts is not the kind of resort to the judicial process which, even in the presence of retaliatory motivation, was intended to be

---

[6] The Board cites *International Organization of Masters*, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978), as an example of a lawsuit found in violation of the NLRA because it was not filed "in complete good faith." [NLRB Brief, pp. 20-21.] The *Masters* case is distinguishable from the present case in significant respects. First of all, the union in *Masters* utilized an *in rem* action to obtain a lien against the employer's vessel, requiring the owner to post a $100,000 bond for the vessel's release. Secondly, there was ample evidence that the civil action was directly related to picketing, handbilling, and other activities, all of which had the unlawful objective of compelling the employer to replace its existing employees with those belonging to the union. 575 F.2d at 904. Finally, it is significant that in *Masters* the Board did not attempt to interfere with any pending state court proceeding, and its order contained no mandate with respect to such a proceeding. The facts in *Masters* are thus much closer to the facts in *California Motor Transport* than are the facts in the present case.

encompassed by the principle of *California Motor Transport*.[7] The Restaurant's civil litigation simply did not rise to the level of obnoxiousness that would warrant federal interference with its First Amendment right to petition the judiciary.

B. The Exception For "State Proceedings Motivated By A Desire To Harass" Does Not Apply Here.

The NLRB seeks to analogize this case to *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Younger v. Harris*, 401 U.S. 37 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Those cases recognized the propriety of "federal interference in state court proceedings" brought by state officials in bad faith or to discourage protected activities. [NLRB Brief, p. 33.] But the Board's analogy actually serves to strengthen the arguments supporting federal abstention from interference in the Restaurant's civil litigation.

All three of the cases cited by the Board involved state use of criminal or quasi-criminal proceedings to enforce allegedly unconstitutional statutes. Only in *Dombrowski*, where there was purportedly "a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants" (380 U.S. at 482), did this Court approve a federal court injunction against the state proceedings. In *Younger* and *Huffman*, on the other hand, no such pattern existed, and the Court held that federal intervention was unwarranted because "the threat to the plaintiff's federally protected rights [could] be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46; 420 U.S. at 604. That reasoning is clearly applicable, by analogy, to the present case, since the protesters' successful defense of the Restaurant's single civil action would have eliminated any alleged "threat" to their "federally protected rights." The dispositive question in such cases is whether the state

---

[7] The Board has been inconsistent and selective in its approach to the principle of *California Motor Transport*. In *Power Systems, Inc.*, 239 N.L.R.B. 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979), the Board ruled that an employer had committed an unfair labor practice by suing an employee who had filed a series of baseless administrative charges. Having held in *Power Systems* that the employee's *numerous* groundless charges were privileged, the Board now urges this Court to rule that a *single* groundless action by an employer would not be privileged.

judiciary is able to provide a fair and effective forum for the dispute, including the resolution of constitutional and other federal issues, and this Court has repeatedly required deferral to a pending state proceeding with respect to such issues. *E.g.*, *Moore v. Sims*, 442 U.S. 415, 430, 435 (1979); *Huffman*, 420 U.S. at 608-10. In the present case, there is no challenge to the ability or willingness of the state judiciary to properly balance employee rights under the NLRA against the property rights of an employer.

We recognize that, in *Huffman* and *Younger*, the Court did acknowledge an exception to the abstention doctrine where "the state proceeding is motivated by a desire to harass or is conducted in bad faith." 420 U.S. at 611; 401 U.S. at 49, 54. However, the Court's statements regarding that exception should be understood in the context of the underlying cases — state actions to enforce allegedly unconstitutional statutes — and applied only to proceedings in which litigation is pursued in such an oppressive or repetitive manner that the successful defense of one case is unlikely to secure the rights at issue.[8] The Court has repeatedly disapproved federal intervention in the absence of such extraordinary circumstances.

---

[8] In cases involving enforcement of state criminal statutes, the Court has interpreted "bad faith" to mean prosecution "without hope of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975); *Dombrowski*, 380 U.S. at 490. The Board did not find that the Restaurant instituted its suit without hope of success, *i.e.*, the securing of an injunction against tortious conduct and compensation for damages suffered. Indeed, the Restaurant was successful in several aspects of the litigation. See p. 10, *supra*. Furthermore, the Restaurant's plea for $500,000 damages does not constitute the kind of "harassment" that would justify federal intervention under the *Dombrowski* precedent, as suggested by the Board. [NLRB Brief, p. 35.] *See Cousins v. Wigoda*, 463 F.2d 603, 608 (7th Cir. 1972) (a "frivolous and overly broad" prayer for relief "is not the kind of conduct which the Supreme Court described as 'bad faith' or 'harassment' in *Dombrowski*"). In fact, the Board shows little concern for consistency when it argues, on the one hand, that the Restaurant's $500,000 plea evidenced its utilization of litigation for harassment [NLRB Brief, p. 35], while also arguing, on the other hand, that there was no evidence of improper motive in the slander suit considered in *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977), despite the plea for $50,000 damages against an employee earning only minimum wage. [NLRB Brief, p. 29.] *See also Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (employer's defamation suit sought $1,000,000 in damages from union, two union officials, and a company employee).

See, e.g., Moore, 442 U.S. 415; *Juidice v. Vail*, 430 U.S. 327 (1977). No such circumstances exist in the present case.

The Ninth Circuit and the Board's ALJ determined that the Restaurant's civil action had to be enjoined because of "the chilling effect of a state lawsuit upon activity protected by the Act." [Pet. App. A-12 n.3, A-42.] But in *Younger* this Court held that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." 401 U.S. at 51. The rulings of the Ninth Circuit and the Board in this case are therefore inconsistent with the principles established by this Court in *Dombrowski, Huffman* and *Younger*, because those rulings ignore the Court's admonition that federal interference with state judicial proceedings will be tolerated only in the most extreme and unusual circumstances.

C. The Exception For Conduct That Constitutes An Abuse Of Process Does Not Apply Here.

The Board contends on page 34 of its brief that an employer's retaliatory suit against his employees is analogous to an abuse of process, justifying the Board's cease-and-desist order. That, argues the Board, is what happened in the present case. The great irony in this case is, of course, that the state court ruled that no abuse of process had occurred. [Br. App. "D".] Thus, the issue becomes: shall the state court or the NLRB be the final arbiter of whether state judicial processes have been abused? We submit that the answer is self-evident.[9]

Moreover, even if the Board could order an employer to cease a state court proceeding on the ground that his abuse of process is threatening rights protected by the NLRA, such a drastic measure cannot, as the Board asserts [Brief, p. 34, n. 22], be founded merely upon the *institution* of a suit. *See Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 697 (9th Cir. 1981). Nor could it be founded solely upon the Board's finding that the suit is tainted by

---

[9] In the case relied upon by the Board, *Alexander v. Unification Church of America*, 634 F.2d 673 (2d Cir. 1980), the appellate court, not an outside agency, made the determination that a cause of action for abuse of process had been alleged in the complaint, and the matter was remanded to the trial court for factual findings.

retaliatory motivation. Such a finding does not, without more, establish an abuse of process. Thus, in refusing to find an employer's suit against a union to be an unfair labor practice, the Second Circuit held:

> But even if we assume that the Company was improperly motivated — that it intended the suit to induce the Union to withdraw its charges — this alone would not make resort to the courts unlawful so as to justify an unfair labor practice finding. Abuse of process requires more than simply improper motive. There must also be some action taken to utilize the court's processes for collateral purposes not related to the suit in question, for example, improper use of a subpoena.

Lodge 743, IAMAW v. United Aircraft Corp., 534 F.2d 422, 464-65 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). *See also* W. Prosser, *Handbook of the Law of Torts* § 121, at p. 857 (4th ed. 1971) ("[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.").

The Board does contend that the Restaurant's "improper use of the information gained in the depositions of its employees" constituted an abuse of process. [NLRB Brief, p. 34, n.22.] For example, the Board argues that the Restaurant sought to establish a defense to the pending unfair labor practice hearing on Ruth Helton's discharge by asking "numerous questions" relevant to the issues in that proceeding. [*Id.* at 6-7, 36.] Such discovery does not constitute an abuse of process, however, because it was directed at, and relevant to, issues underlying the Restaurant's civil suit.[10] *See Blue Goose Growers*, 641 F.2d at 697. After all, the Board itself has previously held that an employer does not violate the NLRA by filing a slander suit against an employee who publicly asserts that she has been threatened with discharge as a result of her union activities. *S. E. Nichols Marcy Corp.*, 229 N.L.R.B. 75 (1977).

---

[10] The NLRB also claims that the Restaurant used the information obtained in its depositions "for interrogating a former waitress" [NLRB Brief, p. 36], but one manager's nonthreatening inquiries to a former employee he had known for many years [Tr. 455] cannot fairly be considered an "abuse of process" even if, under the NLRA, they technically constitute an "interrogation."

In the present case, Ruth Helton's leaflet, upon which the Restaurant's libel action was based, alleged that she had been discharged because of her union activities. [Jt. App. 2.] If the filing of the suit was lawful, the taking of discovery relevant to Helton's alleged defamation could hardly be characterized as an abuse of process. Furthermore, the Restaurant was acting under authority of a court order permitting discovery into the factual basis for each allegation on the offensive leaflet. [Jt. App. 39-40.] In comparable circumstances, this Court has held that a party's reliance on "judicial authorization" for his conduct operates to dispel an inference of bad faith. *Hicks v. Miranda*, 422 U.S. 332, 351 (1975).

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), does not compel a different result. In that case, the Court upheld the Board's refusal to permit prehearing disclosure of witness statements given to Board investigators. In the present case, the employer's inquiry was directed at statements made *publicly* on the streets of Phoenix. If an employee could preclude employer litigation and discovery based on his public accusations merely by also filing his accusations with the appropriate federal agency, employers would be extremely vulnerable to defamation. In the present case, for example, could the employees have avoided a libel suit based on their accusation of "filthy restrooms" by filing a complaint with the Occupational Safety and Health Administration? Could the employees have likewise avoided a suit based on their public accusations of "unwarranted sexual advances" by filing charges with the Equal Employment Opportunity Commission? Any privilege that attaches to such statements, we submit, is limited by the nature and location of the publication: if the statements are made to the appropriate state or federal agency, a privilege attaches and a subsequent defamation suit may not be maintained; on the other hand, if the same statements are made publicly, then the publisher may be held responsible for his actions in a court proceeding. [See cases cited in petitioner's opening brief, pp. 27-28.]

III. THE BOARD'S REQUEST FOR A GENERAL EXEMPTION FROM THE ANTI-INJUNCTION ACT IS NOT SUPPORTED BY THE ACT OR BY LEGAL PRECEDENT.

Petitioner's opening brief [pp. 36-40] argued that the Anti-Injunction Act, 28 U.S.C. § 2283 (1976), prohibited the Board from enjoining state judicial proceedings except where one of the three statutory exceptions was applicable or, under *NLRB v. Nash-Finch*

Co., 404 U.S. 138 (1971), where state action was preempted by the NLRA. In response, the Board contends that the principle of *Nash-Finch* is not limited to situations in which state action is preempted, but instead "encompasses any situation in which a state court suit threatens to abridge 'federal rights' the United States or one of its agencies is entrusted with protecting." [NLRB Brief, p. 44.] Petitioner urges this Court to reject such an expansive interpretation of the statute and to hold, again, that the prohibition of Section 2283 "is not to be whittled away by judicial improvisation." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 631 (1977). *See also Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970); *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511 (1955).

In seeking a total exemption from the mandate of Section 2283, the Board relies upon cases in which this Court has subordinated the prohibition of the statute to "superior federal interests." [NLRB Brief, p. 43.] But the cases relied upon are inapposite, since, unlike the present situation, the interest of the state court in hearing those cases was clearly not as great as the interest of the federal forum. In *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), for example, the United States obtained an injunction against state litigation over land in which it had an interest, since it was not a party to such litigation, and since its own action to quiet title to the land was then pending in federal district court. In *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the Board enjoined a state court injunction directed at picketing, handbilling and other protected conduct subject to the preemptive jurisdiction of the Board.[11]

In clear contrast to the circumstances of *Leiter Minerals* and *Nash-Finch*, the Restaurant's state court suit did not involve issues that were pending before or subject to the preemptive jurisdiction of a federal court or agency. Moreover, as *Linn, Farmer* and their progeny make abundantly clear, there is "an overriding state interest" in resolving claims of tortious conduct arising out of labor

---

[11] *See also Bowles v. Willingham*, 321 U.S. 503 (1944), in which the Administrator of the Office of Price Administration was held entitled to enjoin state proceedings challenging certain OPA regulations, despite the Anti-Injunction Act, because an Emergency Court of Appeals had preemptive jurisdiction over such challenges. *Id.* at 510-11.

disputes that is in fact superior to the "merely peripheral concern" that the Board might have in ruling upon the application of the NLRA to the same conduct. *Linn*, 383 U.S. at 61; *Farmer*, 430 U.S. at 298, 303-04. The Board's response is that its interest lies in preventing retaliation, not in adjudicating the merits of the state suit [NLRB Brief, pp. 35-41], but the Board proposes to analyze the factual and legal basis of the suit in order to draw an inference regarding motive. The Board's interest in preventing abuse of federal rights is, we submit, insufficient to justify the massive intrusion into the state judicial process caused by its preliminary screening of employer tort suits.

In support of its claim that Section 2283 is inapplicable, the NLRB cites two cases in which this Court, without considering the Section, upheld Board orders requiring unions to terminate state court litigation to recover fines charged to former members. *Booster Lodge 405, IAMAW v. NLRB*, 412 U.S. 84 (1973); *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972). [NLRB Brief, pp. 43-44.] In both cases cited, however, the very relief sought — the collection of fines for post-resignation conduct — would have violated the NLRA. The federal interest to be protected could thus be discerned on the face of the state court pleadings, without requiring a preliminary trial of the merits or a construction of state law. In the present case, on the other hand, the Restaurant's civil suit "had a lawful objective on its face" [Pet. App. A-10], and the Board's conclusion that the suit infringed upon federal rights was based upon an analysis of the factual and legal basis for the tort action.[12]

The Board also argues that, even if Section 2283 does apply, the order in this case was proper under the exception for injunctions "necessary in aid of [the Board's] jurisdiction." [NLRB Brief, p. 46.] In a classic example of "bootstrap" reasoning, the Board

---

[12] Although the Board's injunction against a *pending* civil suit may be barred by Section 2283, the Board may have the power to enjoin the commencement of a *subsequent* suit if it concludes from the course and outcome of the first one that such additional proceedings would violate the NLRA. *See Vendo*, 433 U.S. at 635 n.6. The Board may also, in appropriate circumstances, rule that a *completed* civil action was an unfair labor practice. *See International Organization of Masters*, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978) (union's *in rem* action against employer's vessel, coupled with picketing and other coercive activities, violated NLRA).

declares that, in order to decide whether the filing of the state court lawsuit was an unfair labor practice, it had jurisdiction to determine whether the suit had a "reasonable factual basis," and it had the authority to issue an injunction in aid of this "jurisdiction." The flaw in this theory is, of course, that the fundamental question of whether the Board did indeed have jurisdiction to examine the merits of the suit goes unanswered. *See also Vendo,* 433 U.S. at 642 (injunction to "preserve" a case or controversy is not "necessary in aid of" a court's jurisdiction).

Finally, in a footnote, the NLRB contends that its order requiring termination of the Restaurant's suit fell within the Section 2283 exception allowing injunctions against state proceedings when "expressly authorized by Act of Congress." [NLRB Brief, p. 46 n.31.] The Board bases its contention upon Section 10(e) of the NLRA, 29 U.S.C. § 160(e), which gives the Board the power to petition the Circuit Courts of Appeals for enforcement of its orders. However, not all federal statutes authorizing injunctive relief are exceptions to Section 2283. In *Mitchum v. Foster,* 407 U.S. 225 (1972), the Court held that the test for whether a federal statute constitutes an "expressly authorized" exception to Section 2283 is "whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.* at 238. In *Mitchum,* this Court found that 42 U.S.C. § 1983 (1981) is such an "expressly authorized" exception because "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people" in situations where the state courts could not sufficiently protect federal rights. *Id.* at 242. In the present case, it cannot be said that the NLRA can be given its intended scope "only by the stay of a state court proceeding." If, as the Board claims, the Restaurant's suit is groundless and retaliatory, the state court is the appropriate forum for determining an effective remedy, thereby alleviating any infringement of NLRA rights caused by such a suit. Moreover, in *Linn* and *Farmer,* unlike *Mitchum,* this Court found that Congress intended to reserve to the states substantial control over certain disputes "deeply rooted in local feeling and responsibility." *Farmer,* 430 U.S. at 298, 302-04; *Linn,* 383 U.S. at 62-64. [See also state court cases cited in petitioner's opening brief, p. 10 n.5.] The civil litigation between the Restaurant and the protesters is just such a dispute.

CONCLUSION

For all the foregoing reasons, Petitioner, Bill Johnson's Restaurants, Inc., respectfully requests that the decision of the Ninth Circuit with respect to the issues raised herein be reversed, and that the case be remanded to that court with instructions to deny enforcement of the Board's order insofar as it relates to the civil lawsuit filed by Petitioner in Maricopa County Superior Court (No. C375470).

Respectfully submitted this 15th day of March, 1983.

LAWRENCE ALLEN KATZ
STREICH, LANG, WEEKS & CARDON
A Professional Association
2100 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-0999
Counsel for Petitioner

Of counsel:
N. GREGORY SMITH
SUSAN GAYLORD GALE

No. 81-2307

In The

Supreme Court of the United States

October Term, 1982

Bill Johnson's Restaurants, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

J. Albert Woll
815 15th Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5290
(Counsel of Record)

Of Counsel:

Michael H. Gottesman
Jeremiah A. Collins
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the respondent in the instant case.

The AFL-CIO is a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women. This case is of concern to the AFL-CIO in two respects.

First, the case presents the question whether an employer violates the National Labor Relations Act by prosecuting a lawsuit without having any basis in fact to support the suit, for the sole purpose of punishing employees for filing a charge with the National Labor Rela-

tions Board ("Board") and for engaging in other protected activities, and if so, whether the Board is authorized to order the employer to cease and desist from prosecuting the suit. The resolution of those issues will have a substantial impact on the interests of the AFL-CIO and its members, and the accompanying brief *amicus curiae* presents the AFL-CIO's arguments as to their proper resolution.

Second, the accompanying brief explains why this case does *not* present any questions concerning a subject to which the bulk of the Brief for Petitioner is devoted: the doctrine of federal preemption based on the exclusive primary jurisdiction of the Board, as developed in *San Diego Unions v. Garmon*, 359 U.S. 236, and subsequent cases such as *Farmer v. Carpenters*, 430 U.S. 290, and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180. The AFL-CIO has a significant interest in presenting its views as to how petitioner has misconceived the nature of the issues presented in this case, and as to why the doctrine of the Board's primary jurisdiction is not implicated here.*

---

* It was our understanding that the respondent had secured an extension of time for filing its brief to Monday, January 31, 1983. In fact, as we learned on Friday, January 28, 1983, that extension of time was only until January 28th. Once our confusion on this score was corrected we made arrangements to serve counsel for the parties with final page proof on the due date, to file the printed motion and brief with the Court at approximately 10 a.m. on Monday, January 31st, and to serve those copies on counsel for petitioner by express mail and on counsel for respondent by hand. Since our error will not delay consideration of the case nor disadvantage the parties we respectfully request that despite that error this motion be granted.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Of Counsel:

MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	4
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:

Allen-Bradley Local v. Wisconsin Board, 315 U.S. 740	10
Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511	13, 19
Automobile Workers v. Russell, 356 U.S. 634	10
Booster Lodge 405 v. NLRB, 412 U.S. 84	3, 12
California Motor Transport v. Trucking Unlimited, 404 U.S. 508	12
Capital Service, Inc. v. NLRB, 347 U.S. 501	3, 11
Clyde Taylor Co., 127 NLRB 103	13, 15
Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656	10
Farmer v. Carpenters, 430 U.S. 290	10, 11
Frank Visceglia, 203 NLRB 265, enf. den. on other grds. 498 F.2d 43 (3rd Cir. 1974)	15
Garrison v. Louisiana, 379 U.S. 64	16
Gertz v. Robert Welch, Inc., 418 U.S. 323	16
Graver Mfg. Co. v. Linde Co., 336 U.S. 271	8
Hill v. Florida, 325 U.S. 358	11
Linn v. Plant Guard Workers, 383 U.S. 53	10
Machinists v. Gonzales, 356 U.S. 617	10
Machinists v. Wisconsin Empl. Rel. Comm'n, 427 U.S. 132	11
Maher v. Gagne, 448 U.S. 122	8
Mitchum v. Foster, 407 U.S. 225	4, 19
Namet v. United States, 373 U.S. 179	7
Nash v. Florida Industrial Comm'n, 389 U.S. 121	12, 13
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274	17
Machinists v. Wisconsin Empl. Rel. Comm'n, 427 U.S. 132	11

TABLE OF AUTHORITIES—Continued

	Page
Maher v. Gagne, 448 U.S. 122	8
Mitchum v. Foster, 407 U.S. 225	4, 19
Namet v. United States, 373 U.S. 179	7
Nash v. Florida Industrial Comm'n, 389 U.S. 121	13
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274	17
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96	12
New York Times Co. v. Sullivan, 376 U.S. 254	16
NLRB v. Gissel Packing Co., 395 U.S. 575	15
NLRB v. Nash-Finch Co., 404 U.S. 138	3, 4, 11, 13, 19
NLRB v. Scrivener, 405 U.S. 117	13
NLRB v. Transportation Management Corp., No. 72-168	17
Otter Tail Power Co. v. United States, 410 U.S. 366	12
Otter Tail Power Co. v. United States, 417 U.S. 901	12
San Diego Unions v. Garmon, 359 U.S. 236	9, 11
Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180	9, 10, 11, 13
Shepard v. Labor Board, —— U.S. ——, 51 U.S.L.W. 4087 (aJn. 18, 1983)	18
Teamsters v. Morton, 377 U.S. 252	11
United Credit Bureau v. NLRB, 454 U.S. 997	16
Universal Camera Corp. v. Labor Board, 340 U.S. 474	8
Vendco Co. v. Lektro-Vend Corp., 433 U.S. 623	12, 13, 19
Youngdahl v. Rainfair, Inc., 355 U.S. 131	10
Anti-Injunction Act	
28 U.S.C. § 2283	4, 12, 18
National Labor Relations Act, as amended	
§ 8(a)(1), 29 U.S.C. § 158(a)(1)	*passim*
§ 8(a)(4), 29 U.S.C. § 158(a)(4)	*passim*
§ 10(c), 29 U.S.C. § 160(c)	3, 17
Other Authorities:	
Restatement (Second) of Torts (1977)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

1. It is undisputed in this Court that petitioner Bill Johnson's Restaurant committed a series of unfair labor practices, including an unlawful threat to "get even" with employees who had engaged in conduct protected by the National Labor Relations Act ("the Act"). This case concerns the particular manner in which petitioner carried out that threat: the prosecution of a lawsuit in state court against the employees, seeking more than $500,000 in damages.

The National Labor Relations Board found that petitioner filed the suit without having any basis in fact for the allegations made in its complaint, and that petitioner's sole motive for filing the suit was—by subjecting the employees to the costs and burdens of defending the suit—to "punish" them for filing an unfair labor practice charge with the NLRB and for engaging in other protected activities. On the basis of these findings, the Board concluded that petitioner's prosecution of the suit violated Sections 8(a)(1) & (4) of the Act, and "[i]n order to dissipate the effect of [petitioner's] unfair labor practices" the Board ordered, *inter alia*, that petitioner withdraw the suit. The Court of Appeals, concluding that the Board's findings were supported by substantial evidence, enforced the Board's order.

2. In attacking the Board's order, much of petitioner's brief is addressed to a point that is not properly in issue. Petitioner characterizes that order as one premised on the doctrine of federal preemption that flows from the Board's exclusive primary jurisdiction. In petitioner's words, the decisions below rest on "the theory that the Board assumes preemptive jurisdiction of a libel claim once an unfair labor practice charge is filed".[1] But neither the Board nor the Court of Appeals proceeded on any such theory. The Board did not mention preemption at all in finding petitioner's suit to be an unfair labor practice and ordering that it be withdrawn; and the Court of Appeals was explicit that the Board's order warranted enforcement "[w]hether or not the state court's jurisdiction [wa]s technically preempted." The suit was ordered withdrawn here only after the Board had adjudicated that its prosecution was unlawful, not "once an unfair labor practice charge [wa]s filed". This case, accordingly, does not present the question whether the state court should have viewed itself as lacking jurisdiction of petitioner's suit by virtue of federal preemption. Nor does

[1] Brief for petitioner at 19.

the case present the question whether, at any particular point, the Board could properly have obtained in federal court an injunction against the prosecution of petitioner's suit on the ground that it was preempted, pursuant to the doctrine of *NLRB v. Nash-Finch Co.*, 404 U.S. 138, or *Capital Service, Inc. v. NLRB*, 347 U.S. 501. Quite simply, no issues of preemption—as that term is ordinarily understood—are presented in this case.

3. (a) With respect to the issues that *are* presented here, it is too late in the day to argue that the prosecution of a lawsuit in state court is *per se* immune from being denominated an unfair labor practice; for this Court has previously held that in certain instances a party "commits an unfair labor practice in seeking [state] court enforcement" of alleged claims against employees. *Booster Lodge 405 v. NLRB*, 412 U.S. at 84, 85. And, with respect to the particular lawsuit at issue in this case, petitioner's prosecution of the suit without having any factual basis for the allegations made therein, and for the sole purpose of punishing employees for filing an NLRB charge and exercising their § 7 rights, violates both the terms and the policies of Sections 8(a)(4) and (1) of the Act. Where, as here, an employer's resort to the courts is in bad faith, and he has no basis in fact for his professed claims but asserts them solely to retaliate against employees for their exercise of protected rights, to exempt the employer from liability on the basis of an asserted right to pursue claims in court would be to subordinate important federal statutory interests to a "right" which, as found below, has been invoked by the employer only in appearance, not in actuality.

(b) The Court of Appeals correctly reasoned that "[s]ince the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice." Section 10(c) of the Act, 29 U.S.C. § 160(c), specifically requires that if the Board

finds that any person has committed an unfair labor practice, "the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of th[e] Act." Only by issuing the order in dispute could the Board be faithful to that command.

(c) Petitioner's final contention, that the Board's order requiring it to withdraw its suit was contrary to the Anti-Injunction Act, 28 U.S.C. § 2283, is frivolous. The legality under federal law of prosecuting the sham lawsuit was properly before the Board on an unfair labor practice charge, and the Board found that the prosecution of the suit constituted a violation of federal law. That being so, the case presents a "superior federal interest" which, when asserted by a federal agency (as opposed to a private party), provides an established basis for enjoining a state court suit notwithstanding the Anti-Injunction Act. *NLRB v. Nash-Finch Co.*, *supra*; *Mitchum v. Foster*, 407 U.S. 225, 235-236.

ARGUMENT

1. Because the Brief for Petitioner seeks to obscure the narrow question that is properly presented for review, we begin by placing in context the holdings of the Board and the Court of Appeals that are at issue here.

a) This case involves a series of unfair labor practices committed by petitioner Bill Johnson's Restaurant. First, petitioner discharged Myrland Helton, a waitress, because of her efforts to organize the restaurant's employees.[2] Next, petitioner unlawfully interrogated another employee concerning union activities.[3] Then, after the

[2] Pet. App. A-6 to A-8 (Court of Appeals decision); *id.* at A-21 to A-29 (decision of Administrative Law Judge ("ALJ")).

[3] *Id.* at A-9 (Court of Appeals decision); *id.* at A-29 to A-30 (ALJ decision).

Board had issued a complaint with respect to the violations just described, when Helton and others peacefully picketed the restaurant protesting Helton's unlawful discharge and asserting other grievances, petitioner responded with yet another unfair labor practice, in the form of "threats [that] were designed to persuade the picketers to cease their lawful activities. . . ."[4] Among other coercive statements, petitioner vowed to "get even" with Helton and the other pickets.[5]

In this Court the Board's determinations, affirmed by the Court of Appeals, that petitioner committed each of the unfair labor practices just noted, including the unlawful threat to "get even" with the employees who had engaged in protected activity, are not challenged.[6] Rather, the issues presented to this Court for review evolve out of the particular manner in which petitioner proceeded to carry out that threat: the prosecution by petitioner of a lawsuit in state court against Helton and the other pickets claiming more than $500,000 in damages.[7]

b) The complaint in petitioner's state-court suit alleged that the pickets had wrongfully interfered with the restaurant's business by engaging in "mass picketing and harassment,"[8] and that they had libeled petitioner

---

[4] Pet. App. A-34 (ALJ decision); *see also id.* at A-14, n.2 (Board decision); *id.* at A-9 (Court of Appeals decision).

[5] *Id.* at A-32—A-34 (ALJ decision); *id.* at A-14, n.2 (Board decision); *id.* at A-9 (Court of Appeals decision).

[6] "As it is clear on this record that the picketing being conducted was a protected concerted activity, it is equally clear that [the restaurant's] threat to get even with [the pickets] for engaging in such activity violated . . . the Act." *Id.* at A-33 (ALJ decision.)

[7] As the Board found, petitioner's "threat to get even . . . ultimately culminated in the filing of the civil suit . . ." *Id.* at A-34 (ALJ decision).

[8] Jt. App. 3-4.

by making false statements, including "misrepresentations of proceedings pending before the National Labor Relations Board. . . ." [9] On its face, of course, there was nothing inappropriate about the complaint. The Board, after a full unfair labor practice hearing, found, however, that petitioner had no basis in fact for the allegations made in the complaint; [10] and, reviewing the record as a whole, the Board concluded that "the true purpose behind the lawsuit was to punish Helton for having filed the charge [with the Board concerning her discharge] . . . , and to punish the picketers for engaging in protected concerted activity, and to prevent them from further asserting those rights." [11] Petitioner's motive, the Board found, was to retaliate for the protected activities already undertaken by subjecting Helton and the pickets to the costs and burdens of litigation, and to place its other employees "on notice" that if they engaged in protected activities petitioner might retaliate against them in the same manner.[12]

On the basis of these findings, the Board held that by filing and prosecuting the suit petitioner violated Sections 8(a)(1) and 8(a)(4) of the Act.[13] "In order to

---

[9] *Id.* at 4, 6-7.

[10] Pet. App. A-40 to A-42 (ALJ decision).

[11] *Id.* at A-42 (ALJ decision). See also *id.* at A-52 (ALJ decision).

[12] *Id.* at A-42 (ALJ decision).

[13] *Ibid.* See also *id.* at A-52 (ALJ decision). Section 8(a)(1), 29 U.S.C. § 158(a)(1), provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The "rights guaranteed in Section 7", 29 U.S.C. § 157, include "the right to self-organization, to form, join, or assist labor organizations . . ., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(4), 29 U.S.C. § 158(a)(4), makes it an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

dissipate the effect of [petitioner's] unfair labor practices," the Board ordered that petitioner "[c]ease and desist from . . . [p]rosecuting its complaint. . . .," and withdraw the complaint and reimburse Helton and the other state-court defendants "for all legal expenses incurred in the defense of said lawsuit. . . ." [14]

The Court of Appeals affirmed the Board's finding "that the lawsuit was filed in bad faith to retaliate against the picketers".[15] The court expressly found "that there is substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity." [16]

c) Although much of the Brief for Petitioner is written as if petitioner's lawsuit had been filed in good faith, rather than in bad faith as found below, we take the Board's findings of fact, affirmed by the Court of Appeals, as established for purposes of our submission. Petitioner has not sought to challenge those findings in this Court,[17] and there would in any event be no occasion to set aside the concurrent findings of the Board

---

[14] Pet. App. A-53 to A-54 (ALJ decision).

[15] *Id.* at A-10 (Court of Appeals decision).

[16] *Ibid.* Because the Board and the court below relied upon the combination of *both* petitioner's lack of a factual basis for the suit and petitioner's unlawful motivation for its institution, this case presents no questions as to the propriety of finding an unfair labor practice and/or ordering withdrawal of a lawsuit where only one or the other (but not both) of these facts is found. See also note 34 *infra*.

[17] The questions on which certiorari was sought and granted do not include any challenge to the findings of fact (cf. *Namet v. United States*, 373 U.S. 179, 190), and even in its brief petitioner does not argue that the Board's findings were not supported by substantial evidence; for the most part, petitioner simply ignores the pertinent findings.

and the Court of Appeals. "Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491. And, proper occasions for such intervention are particularly rare where what is in question are the concurrent findings of the Board and the court of appeals. *Maher v. Gagne*, 448 U.S. 122, 129-130; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

Thus, given the facts as found by the Board and the Court of Appeals, the questions to be decided in this case are (i) whether an employer violates the Act by prosecuting a baseless lawsuit for the sole purpose of retaliating against one employee for filing a charge with the Board and against others for engaging in protected concerted activity in support of the charging party, and (ii) if so, whether the Board is authorized to order the employer to cease and desist from prosecuting the suit. We address those questions at pp. 11-19 *infra*.[18]

2. Before turning to those questions, however, it is important to understand that this case does *not* present any questions concerning a subject to which the bulk of the Brief for Petitioner is devoted: the doctrine of federal

[18] The questions on which certiorari was sought and granted do not place in issue—assuming the unfair labor practice properly was found—the propriety of the Board's ordering petitioner to reimburse the employees for their legal expenses incurred in the defense of the lawsuit, and accordingly we do not discuss that question. In addition, although the Board addressed the question whether petitioner also violated the Act in taking certain depositions, the Court of Appeals properly declined to reach that question, because the court concluded that the prosecution of the suit was in itself unlawful. Pet. App. A-12. The issue of the depositions is likewise outside the scope of the questions on which certiorari was sought and granted, and we do not address it.

preemption based on the exclusive primary jurisdiction of the Board, as developed in *San Diego Unions v. Garmon*, 359 U.S. 236, and subsequent cases such as *Farmer v. Carpenters*, 430 U.S. 290, and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180.

The Brief for Petitioner suggests that this case presents the kinds of issues that are the subject of the *Garmon* doctrine; the brief speaks time and again of such issues as the extent to which "the states must . . . yield to the primary jurisdiction of the NLRB" [19] and the question of "what conduct remain[s] subject to state court scrutiny during a labor dispute." [20] Although petitioner does not explain why such issues are implicated in this case, its submission appears to rest on the assertion that the Court of Appeals decided this case on "the theory that the Board assumes preemptive jurisdiction of a libel claim once an unfair labor practice charge is filed." [21]

But the Court of Appeals did not adopt such a theory. Rather, that court held that it was proper for the Board to order petitioner to withdraw its suit *after the Board had found that the prosecution of the suit was an unlawful act*—not "once an unfair labor practice charge [wa]s filed." Furthermore, as the court below explained, the suit was ordered to be withdrawn because the suit was an "unfair labor practice" [22] and "[w]hether or not the state court's jurisdiction [wa]s technically *preempted*." [23] And the Court of Appeals' approach paralleled

---

[19] Brief for Petitioner at 8.

[20] *Id.* at 11.

[21] *Id.* at 19.

[22] "Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice." Pet. App. A-12 (Court of Appeals decision).

[23] Pet. App. A-13 (Court of Appeals decision) (emphasis added).

the Board's; indeed, in discussing its decision to order the withdrawal of the suit the Board did not even mention the *Garmon* preemption doctrine.[24]

Thus, neither the Board nor the Court of Appeals held that the state court's jurisdiction over the subject matter of petitioner's suit was preempted by the primary jurisdiction of the Board; both held only that petitioner had violated the Act by prosecuting in bad faith its baseless and retaliatory lawsuit, and that petitioner should be ordered to cease and desist from that unlawful conduct.

This case therefore does not present the question whether the state court lacked jurisdiction of petitioner's suit from the outset by virtue of federal preemption.[25]

---

[24] See Pet. App. A-34 to A-43, A-52 to A-53 (ALJ decision).

[25] Petitioner's state court complaint was drafted to allege a claim for malicious libel, which would ordinarily not be preempted (*Linn v. Plant Guard Workers*, 383 U.S. 53); and the complaint can be construed to allege a claim for picket-line misconduct of a sort that would likewise ordinarily not be preempted (*Automobile Workers v. Russell*, 356 U.S. 634; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131; *Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656; *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740). However, in none of the decisions just cited does it appear that the party accused of misconduct in the state court action had filed a charge with the Board contending that the precise conduct attacked in the state court complaint was, in actuality, of a nature that is protected under the Act. (Nor had such a charge been filed in *Farmer v. Carpenters*, 430 U.S. 290, or *Machinists v. Gonzales*, 356 U.S. 617.) Here, such a charge was filed, and was ultimately found by the Board to be well taken.

Since the question whether the pickets' conduct was protected by the Act was properly presented to the Board by Helton's charge, it follows, we believe, that the filing of the charge should have operated to preempt state court jurisdiction of the restaurant's suit, which challenged the same conduct as actionable. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202, 207 and n.44. But compare *id.* at 208-210 (Blackmun, J., concurring), with *id.* at 212-214 (Powell, J., concurring). However, this Court has not explored how the principles discussed in *Sears* should be applied where, as here, a state court complaint on its face concerns matters that are not preempted,

[Continued next page]

Nor does the case present the question whether, at any particular point, the Board could properly have obtained in federal court an injunction against the prosecution of the restaurant's suit on the ground that it was preempted, pursuant to the doctrine of *NLRB v. Nash-Finch Co.*, 404 U.S. 138, or *Capital Service, Inc. v. NLRB*, 347 U.S. 501.[26] Quite simply, no issues of preemption stemming from the *Garmon* line of cases are presented in this case.[27]

3. What *is* presented here, as has been noted, is (i) the question whether an employer violates the Act by prosecuting a baseless lawsuit for the sole purpose of retaliating against one employee for filing a charge with the Board and against others for engaging in protected concerted activity in support of the charging party, and (ii) if so, whether the Board is authorized to order the employer to cease and desist from prosecuting the suit. As we now show, the answer to both questions is yes.

---

but the state court defendant has filed a charge with the Board presenting a substantial (and here, well-taken) contention that his conduct is actually protected by the Act.

Thus, the issue just discussed which, as we stress, is not presented, is an open one in this Court.

[26] See also *Sears, supra*, 436 U.S. at 207 n.43 (discussing *Nash-Finch* and *Capital Service*.)

[27] This Court's decisions have recognized that the labor preemption doctrine consists of two distinct sets of principles. One branch of the doctrine, discussed in the text, is "based predominantly on the primary jurisdiction of the Board . . . [and] was developed in *San Diego Unions v. Garmon* . . . ." See *Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 138. The other branch is based on the principle that state regulation of a labor dispute is preempted if the rule applied by the state conflicts with the governing federal *substantive* law. See *Machinists, supra*, 427 U.S. at 140-161; *Teamsters v. Morton*, 377 U.S. 252; *Hill v. Florida*, 325 U.S. 358. Cf. *Farmer v. Carpenters, supra*, 430 U.S. at 295 n.5. Petitioner does not contend that the Board's order here conflicts with this Court's rulings on this second branch of the preemption doctrine.

a) It is too late in the day to argue that the prosecution of a lawsuit in state court is *per se* immune from being denominated an unfair labor practice. In *Booster Lodge 405 v. NLRB*, 412 U.S. 84, 85, this Court squarely held that the Board is "authorize[d] . . . to find that a union commits an unfair labor practice in *seeking* [*state*] *court enforcement* of fines imposed for strikebreaking activities by employees who have resigned from the union, even though the union constitution expressly prohibits members from strike-breaking" (emphasis added). That ruling is but one illustration of the more general proposition, recognized both in the common law and this Court's decisions, that the right to assert claims in state court is not an absolute.[28]

---

[28] The common law recognizes a cause of action for "wrongful use of civil proceedings." Restatement (Second) of Torts § 674 (1977). See also *id.* § 682 (abuse of process). And this Court has addressed somewhat similar problems under the federal antitrust laws. In *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, the Court made clear that the prosecution of "sham" suits before state courts or agencies in an effort to restrain competition is in some instances an antitrust violation subject to injunction. See also *Otter Tail Power Co. v. United States*, 410 U.S. 366; *same*, 417 U.S. 901 (summary affirmance following remand); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15. However, the Court has divided as to the precise circumstances in which such suits may properly be enjoined. In *Vendco Co. v. Lektro-Vend Corp.*, 433 U.S. 623, three justices concluded that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from enjoining state court litigation at the behest of a *private party* under the federal antitrust laws, although *future* litigation may be enjoined. *Id.* at 635 n.6 (opinion of Rehnquist, J.). Two justices concluded that the Anti-Injunction Act is not applicable, but that state court litigation cannot properly be enjoined as an antitrust violation if what is at issue is a single lawsuit, rather than a "pattern of baseless, repetitive claims". *Id.* at 643-645 (opinion of Blackmun, J.). Four justices concluded that even where only a single suit is involved, an injunction against the further prosecution of the suit is appropriate relief under the antitrust laws in certain cases. *Id.* at 661 (opinion of Stevens, J.). Since three of the justices in the majority in *Vendco* rested their conclusions on the Anti-Injunction Act, which is not applicable in this case (see pp. 18-19 *infra*), and since *Vendco* and its precursors in-

To be sure, that some lawsuits may be unfair labor practices does not mean that all are.[29] But as we now show, the findings in the instant case establish that the prosecution of the lawsuit at issue here *was* an unfair labor practice.

Section 8(a)(4) of the Act provides that an employer may not "discriminate" in any fashion against an employee "because he has filed charges . . . under this Act." This Court has construed that provision broadly, recognizing that "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *NLRB v. Scrivener*, 405 U.S. 117, 121, quoting *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238. The provision has thus been understood to proscribe all "coercive actions which . . . ha[ve] a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." *Nash*, *supra*, 389 U.S. at 239. A lawsuit brought in bad faith as a means of retaliation against an

---

volved the antitrust laws rather than the NLRA, those decisions provide guidance with respect to the question presented here only in their recognition that the right of access to the courts is not absolute.

[29] In *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 520, the Court noted, without deciding, the possibility "that, if an employer resorts to a state court in relation to conduct that is obviously taken over by the Taft-Hartley Act and outside the bounds of state relief, it may . . . under appropriate circumstances give ground for a finding of an unfair labor practice." In *Nash-Finch*, *supra*, the Court observed, without suggesting its approval, that the Board has held that "a resort to court action . . . does not violate § 8(a)(1)." 404 U.S. at 142, citing *Clyde Taylor Co.*, 127 NLRB 103, 109. In *Sears*, *supra*, the Court quoted that passage from *Nash-Finch*, but left room for the possibility that the Board might "alter its position in cases of this kind. . . ." 436 U.S. at 208, n.44. Neither *Nash-Finch* nor *Sears* involved litigation brought in bad faith. See *Nash-Finch*, 404 U.S. at 154 (White, J., dissenting); *Sears*, 436 U.S. at 185-187.

employee for filing a charge falls squarely within Section 8(a)(4)'s prohibition as so construed.

Similarly, where, as here, a baseless suit is brought to retaliate against employees for having exercised "the right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for . . . mutual aid or protection" (Section 7), it is manifest that the employer has "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in Section 7," and has thereby violated the plain terms of Section 8(a)(1).

Petitioner has not taken issue with the proposition that the kind of baseless, retaliatory litigation found to have been pursued in this case falls within the plain terms of Sections 8(a)(1) and (4). Nor has petitioner pointed to any legislative history that might exempt such lawsuits from the reach of the Act, and we are aware of none. Indeed, petitioner goes so far as to concede that a violation may properly be found "[w]hen the state cause of action is based upon or would restrict employee access to the Board" [30]—although petitioner fails to recognize that under the facts found by the Board in this case, that rule would require affirmance of the Board's order.[31]

Rather, petitioner's argument that its conduct in prosecuting the lawsuit is not an unfair labor practice is based on the notion that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." Brief for

---

[30] Brief for Petitioner at 13.

[31] Petitioner suggests that a distinction should be drawn between cases where the "declared objective for suit, as stated in the complaint," is unlawful, and cases where the unlawful objective is established through other evidence. Brief for Petitioner at 15. Certainly no such distinction can be derived from the terms of §§ 8(a)(1) and (4).

Petitioner at 15, quoting *Frank Visceglia*, 203 NLRB 265, 272, *enf. den. on other grds.*, 498 F.2d 43 (3d Cir. 1974). But that is *not* the ground upon which petitioner's conduct was "called an unfair labor practice."

The Court of Appeals in this case fully accepted the proposition that "[b]efore condemning a lawsuit as an unfair labor practice . . . , the Board must be careful to make an accommodation between the rights of all persons to seek resolution of their legal claims in court and the rights of employees under the NLRA." Pet. App. A-9, citing *Clyde Taylor*, 127 NLRB 103, 109. As part of that accommodation, that court described with approval the Board's policy that an employer who brings a suit in good faith against conduct that he believes to be unlawful will not be held to have violated the Act merely because it is ultimately found that the employees' conduct was in fact lawful and protected by the Act. Pet. App. A-10. But where, as here, an employer sues without any basis in fact to justify his allegations, and does so in bad faith solely as a means of retaliating against employees for having exercised their rights under the Act, no principle of "accommodation" requires the conclusion that the employer should be left free to pursue such a course. For in such a case, it only *appears* that the employer is exercising the right to "seek resolution of [his] legal claims in court;" in reality, the employer is merely engaging in harassment, with no good faith interest in seeking vindication of any colorable legal claims.

An employer's right to prosecute suits against employees, like the employer's right to engage in free speech, "cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1)...." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617. Where, as here, the employer pursues in bad faith, and without basis in fact, a suit designed solely to punish employees for their exercise of Section 7 rights, the balance plainly tips in favor of enforcing the commands of the Act. To exempt

the employer from liability on the basis of an asserted right to pursue claims in court would be to subordinate important federal statutory rights to a "right" which, as found below, has been invoked by the employer only in appearance, not in actuality.[32]

Accordingly, where the Board has properly "ascertain[ed] the intent behind the suit [and] its potential coercive effects upon employees," [33] and has found as fact

---

[32] An instructive analogy may be found in this Court's decisions striking a balance between a publisher's right of free speech and a defamed individual's right to vindicate his reputation. In *New York Times Co. v. Sullivan*, 376 U.S. 254, the Court stated that the right of a publisher to criticize a public official could not adequately be protected by affording to the publisher the defense of truth in a libel action, because "[a] defense for erroneous statements *honestly made* is no less essential . . .," as a means of avoiding undue "self-censorship." *Id.* at 278, 279 (emphasis added). But the Court did not view such considerations to require an absolute immunity for the publisher; consistent with the principle that only statements "honestly made" are entitled to protection, the Court held that the publisher could properly be held liable for a statement made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. As the Court subsequently explained, the holding in *New York Times* rests on the principle that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. . . . They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340. See also *Garrison v. Louisiana*, 379 U.S. 64, 75. Similarly, an employer's right of access to the courts loses any substantial claim to protection where, as here, the employer's suit is baseless and is brought in bad faith to accomplish an illegal purpose. At the least, the employer's "right" in such a case is outweighed by the employees' right to be free of the coercion made unlawful by §§ 8(a)(1) and (4). See also the cases holding that "sham" lawsuits may be enjoined under the antitrust laws without offending the First Amendment, *supra*, n.31.

[33] *Cf. United Credit Bureau v. NLRB*, 454 U.S. 994, 997 n.3 (Rehnquist, J., dissenting from denial of certiorari).

that the suit was brought without basis in fact and in bad faith to coerce employees in their exercise of protected rights, there is no bar to the conclusion that the employer has committed an unfair labor practice.

b) The Court of Appeals correctly reasoned that "[s]ince the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice." Pet. App. A-12. Section 10(c) of the Act, 29 U.S.C. § 160(c), specifically requires that if the Board finds that any person has committed an unfair labor practice, "the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this [Act]." There is no reason not to follow that statutory directive in this case; to the contrary, "the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit." Pet. App. A-12 (Court of Appeals decision).[34]

Petitioner asserts, however, that "the Board has no interest to protect that will not be properly and adequately protected by the state court." Brief for Petitioner at 17.

---

[34] A different calculus would be involved in a case where an employer's suit was filed in part for an unlawful reason and in part for the purpose of pursuing legal rights as to which the employer believed it had a legitimate claim. In such a case, if the employer showed that it would have filed the lawsuit for the latter purpose even in the absence of a retaliatory motive, an order requiring the employer to withdraw the suit might be viewed as an inappropriate "windfall" to employees who would otherwise be answerable in state court for their alleged misconduct. Cf. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274; and see the Brief of the AFL-CIO as *amicus curiae* in *NLRB v. Transportation Management Corp.*, No. 82-168. Such issues are not presented in this case, where the Board found that the employer's suit was completely unfounded and was filed in bad faith solely to accomplish an unlawful objective.

Even if that were true it would be irrelevant, for Congress has designated the Board, not the state courts, as the expert forum "to determine when the policies of the Act would be effectuated by a particular remedy." *Shepard v. Labor Board*, —— U.S. ——, 51 U.S.L.W. 4087, 4088 (Jan. 18, 1983). And, it is *not* true, for whatever may be the efficacy of the protection afforded by the Arizona courts against groundless suits (see *id.* at 29-31), those courts have neither the authority nor the competence to fashion remedies designed "to dissipate the effect of . . . unfair labor practices" [35]—the task that is the Board's and that was undertaken by the Board in this case.[36] Since the Board found that petitioner's state court action was a sham prosecuted solely as an unlawful instrument of coercion, the Board's order that petitioner cease and desist from prosecuting the suit was an appropriate, indeed necessary, remedy for the unfair labor practice found by the Board.

c) Petitioner's final contention, that the order requiring withdrawal of its suit was contrary to the Anti-Injunction Act, 28 U.S.C. § 2283, is frivolous. The contention is based on the assertion that "the subject matter of the state lawsuit—libel, trespass, and improper interference with business—was neither pending before the Board nor subject to its jurisdiction". Brief for Petitioner at 39. Leaving aside the fact that this case does not involve "libel, trespass, and improper interference with business" (as the Board found, those were false allegations advanced by petitioner in bad faith and without any basis for believing them to be true), the

---

[35] Pet. App. at A-53 (ALJ decision).

[36] For example, the Board order requires petitioner to post a notice stating, *inter alia*, that it will not subject its employees to unlawful litigation of the sort involved here, and further stating that it will withdraw its suit and will reimburse the employees for their legal expenses. Pet. App. A-56. The Board directed that this notice be posted at each of petitioner's business establishments. *Id.* at A-54.

point is that the legality under federal law of prosecuting the sham lawsuit was properly before the Board on an unfair labor practice charge, and the Board found that the prosecution of the suit constituted a violation of federal law. That being so, the case presents a "superior federal interest" which, when asserted by a federal agency (as opposed to a private party),[37] provides an established basis for enjoining a state-court suit notwithstanding the Anti-Injunction Act. *NLRB v. Nash-Finch Co., supra.* See also *Mitchum v. Foster*, 407 U.S. 225, 235-236.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be affirmed.

Of Counsel:
MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

---

[37] Compare *NLRB v. Nash-Finch Co., supra*, with *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, and *Vendo Co. v. Lektro-Vend Corp., supra*, note 31.

No. 81-2257

Office - Supreme Court, U.S.
FILED
DEC
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1982

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

EDWARD B. MILLER
Room 3200
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4223
Counsel of Record for the Chamber of Commerce of the United States, as Amicus Curiae

MATTHEW R. McARTHUR
With Him on the Brief

Of Counsel:
POPE, BALLARD, SHEPARD & FOWLE, LTD.
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4200

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60610 (312) 525-0881

TABLE OF CONTENTS

	PAGE
Interest of the Amicus Curiae	2
Preliminary Statement	2
Summary of Argument	5
Argument	
A. Suits Involving State Law Should Be Determined By The State Courts	7
B. Questions of Preemption Are Best Left In The First Instance To The State Courts Or, If Necessary, To The Federal District Courts In Nash-Finch Proceedings	8
C. The Mass Picketing And Trespass Issues In The Instant Case Involve Questions Of Preemption Which Should Have Been Decided In The First Instance By The Arizona Courts	11
D. Primary Jurisdiction Over Clearly Non-Preempted Issues Should Be Left To The State Courts, With The Possible Exception Of Allegations Which In Essence Seek To Bar Access To Board Processes By Claiming Abuse Of The Board's Own Processes	14
E. Effective Judicial Administration Will Not Be Well Served If The Board Is Permitted To Attempt To Impede Access To State Judiciaries	19
Conclusion	21

AUTHORITIES CITED

Cases

PAGE

Amalgamated Utility Workers v. Consolidated Edison Co. of N.Y., 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738 (1940) 8

Clyde Taylor, 127 NLRB 103 (1960) 12, 15, 17

Farmer v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977) 9

Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed 228 (1953) 9

George A. Angle, 242 NLRB 744, enforced 683 F.2d 1296 (10th Cir. 1982) 15, 17, 18

Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945) 8-9

Linn v. Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed. 2d 582 (1966) 9, 10, 14, 19

Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (1958) 9

Machinists v. Wisconsin Employment Relations Comm'n., 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed. 2d 396 (1976) 9

Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971) 9

Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938) 8

NLRB v. Nash Finch Co., 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) 6, 10, 11, 13, 21

PAGE

Plumbers' Union v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 (1963) 9

Power Systems, Inc., 239 NLRB 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979) 15, 17, 18

San Diego Unions v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959) 9, 14

Sears Roebuck and Co. v. Carpenters, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed. 2d 209 (1978) 9, 11, 12

Sheet Metal Workers Local 355, 254 NLRB 773 (1981) 15

Teamsters Union v. Oliver, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed. 2d 312 (1959) 9

Television Wisconsin Inc., 224 NLRB 722 (1976) 15

The United Credit Bureau of America, Inc., 242 NLRB 921 (1979), enforced 643 F.2d 1017 (4th Cir. 1981), *cert. denied* ..... U.S. ....., 102 S.Ct. 539, 70 L.Ed. 2d 404 (1981) 15-16, 17, 18

United Workers v. Laburnum Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954) 9

United Stanford Emp., Etc., 232 NLRB 326 (1977), enforced 601 F.2d 980 (9th Cir. 1979) 15

Weber v. Anheuser Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955) 9

Miscellaneous

28 U.S.C. §2283 10

Miller, *An Administrative Appraisal Of The NLRB*, Table 4, p. 146, published by the University of Pennsylvania (Revised Edition 1980) 20

In the Supreme Court of the United States

OCTOBER TERM 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

This brief amicus curiae is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 245,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The issue before the Court in this case, as viewed by the Chamber—the extent to which a federal regulatory agency may, in purported pursuit of its regulatory mission, bar access of business entities and others to state courts—is of major importance to Chamber members.

PRELIMINARY STATEMENT

The Chamber is not concerned here with the merits of the labor disputes between the petitioning restaurant and its employees. Nor is the Chamber concerned with the merits of the issues of Arizona law which petitioner sought to raise in its civil action in the Superior Court of the State of Arizona.

What does deeply concern the Chamber, however, is what appears to be the attempted usurpation by the NLRB

of state court jurisdiction over even admittedly state court issues such as libel. In the name of, or under the guise of, enforcing the federal labor laws, the NLRB is making preliminary judgments as to whether a respondent's civil suit against employees or others is, or may be, meritorious. If the Board, which has no expertise in such local law matters, concludes, without regard for what the state court's views may be, that the respondent's suit is not "reasonably based" or does not have "colorable merit," it then attributes improper motives to the respondent plaintiff and orders it to withdraw its complaint in the civil suit.

That is what happened here. The petitioner, a respondent in an NLRB proceeding, has been ordered by the Board to withdraw the complaint which it filed against certain of its employees in the Superior Court of the State of Arizona. The Court of Appeals for the Ninth Circuit has enforced this order of the Board.

Because the Chamber believes this case to exemplify an alarming pattern of attempted limitations on the free access of its members to state court judiciaries by federal administrative fiat, we are filing this amicus brief. When non-preempted state law issues are precluded from being litigated in a state court by action of a federal agency, it is our view that the concept of preemption has been stood on its head. We urge this Court zealously to safeguard the authority of our state judicial systems. We further urge that this court carefully circumscribe the authority of federal regulatory agencies, if indeed it finds any such authority exists, to decide under what circumstances a citizen may be denied access to those state judiciaries. It is the Chamber's view that if, as the Board here suggests, the petitioner has abused state court processes, the determination of that fact and the providing of a remedy therefor should be the function of the state courts, not the NLRB.

We will not, in this *amicus* brief, attempt an elaborate factual statement. The detailed facts have been presented by the parties in their respective briefs supporting the petition for certiorari and the opposition thereto. Doubtless they will again be presented in the briefs of the parties which will be filed, now that the writ has been granted.

For purposes of this *amicus* brief suffice it to note that the state court suit, the filing of which by the employer plaintiff against certain of its employees, has here been found by the NLRB to violate the National Labor Relations Act as amended, sought injunctive relief and damages for the following:

(1) Certain acts engaged in by the picketing employee defendants, which plaintiff alleged constituted mass picketing, violence, trespass, and improper obstruction of plaintiff's driveways, all alleged to be contrary to the common and/or statutory law of the State of Arizona; and

(2) Certain leaflets distributed by the employee defendants, which plaintiff alleged contained: (a) false statements about the proceedings pending before the NLRB; (b) false statements that plaintiff's employees had been denied proper overtime pay, were subjected to unwanted sexual advances and were compelled to use a "filthy restroom . . . with no soap, paper towels or toilet tissue provided." Such statements in the leaflets were alleged to be maliciously false and violative of the common law of Arizona relating to libel.

In the unfair labor practice proceeding which resulted in the order challenged in this Court, the Administrative Law Judge found that the evidence presented to *him* was insufficient to support the allegations made in the court suit regarding mass picketing, violence, trespass, and obstruction of driveways. He also found that the evidence

presented to *him* was insufficient to support the libel suit because the statements in the leaflets were, upon his analysis of the evidence, not "misrepresentations."

Having thus analyzed the evidence, the Administrative Law Judge concluded that the plaintiff employer did not have a reasonable basis for its lawsuit. Having so found, the Administrative Law Judge further concluded that the suit was filed as a penalty for filing charges with the NLRB and as a penalty for picketing. This, then, was found to be a violation of Section 8(a)(1) of the National Labor Relations Act, as amended.

Apparently both the state court in Arizona and the Federal District Court in Phoenix were less peremptory in their treatment of the plaintiff employer's claims. While the state court judge denied a preliminary injunction, he had initially, after hearing, issued a temporary restraining order, and the hearing on the permanent injunction has yet to be held. With respect to the libel count, the state court denied the defendants' motion for summary judgment, ruling that there were factual issues requiring a hearing for resolution. Upon the Board's petition for §10(j) relief in this case, the District Court found no reasonable cause to believe that petitioner's state court suit was coercive, discriminatory, or filed for illegal objectives.

SUMMARY OF ARGUMENT

1. The NLRB is not the proper forum to determine the merits of actions brought in state court under state law.

2. To the extent that the subject matter of a state court action may be preempted by federal labor law, the NLRB may either (a) seek to intervene, as a party or in an *amicus* capacity, and present the preemption issue at a proper point in the state court proceeding, or (b) in ap-

propriate cases, seek a federal court injunction enjoining enforcement of the state court order, if it improperly impinges upon the area preempted by federal labor law regulation, *NLRB* v. *Nash Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971). These established means for adjudicating preemption issues are both orderly and adequate. To permit such issues to be decided in the NLRB's unfair labor practice procedures would sanction an unwarranted and improper usurpation by a federal regulatory agency of the proper jurisdiction of the state and federal judiciaries.

3. If the state court action is in an area such as libel, which is not preempted, then the NLRB should not be permitted to impede access to the state courts. The only permissible exception might be in those cases in which the state court action directly attacks a defendant's utilization of the NLRB's processes, such as an action alleging that charges filed with the Board are motivated by fraud or malice. That narrow exception to the rule that the NLRB should leave non-preempted state court issues to the state court system for determination should be re-examined in an appropriate case, but surely should not be expanded to encompass the kind of state court action involved in this case.

4. The statutorily prescribed administrative procedures for remedying unfair labor practices offer neither an appropriate nor effective forum for dealing with allegations of abuse of state court processes, even if such abuses are claimed to interfere with federal regulation of labor disputes.

ARGUMENT

A. Suits Involving State Law Should Be Determined By The State Courts

It would seem axiomatic that the appropriate forum for interpreting and applying the common and statutory law of a state ought to be the courts of that state. That is the very *raison d'etre* for the existence of state judiciary systems. If a further rationale is needed, one need only note that by regular, continuing exposure to issues of state law, the state courts become and remain the only truly expert judiciary in such matters.

Conversely, an Administrative Law Judge employed by the National Labor Relations Board has quite a different area of expertise. His regular and continuing exposure is to issues of interpretation and application of the provisions of the National Labor Relations Act. He becomes expert in the precedents concerning those issues as established by decisions of the National Labor Relations Board, the Courts of Appeal and this Court. His expertise lies in those areas. Only on the rarest of occasions does such an Administrative Law Judge come into contact with state statutes or with the common law of any state. Such a judge is, therefore, ill equipped to decide issues of state law.

At the outset of our analysis here, then, it would seem reasonable to begin with the premise that except for constitutional or policy reasons of overriding importance, the Board's Administrative Law Judges ought not usurp the functions which are properly those of the judicial systems of the several states.

It is just as important, from the standpoint of orderly judicial administration and sound public policy, that state courts be left with the authority and the primary responsibility for interpreting and applying state law, as it is for the National Labor Relations Board to retain the primary authority and responsibility for interpreting and applying the regulatory provisions of the National Labor Relations Act.

B. Questions Of Preemption Are Best Left In The First Instance To The State Courts Or, If Necessary, To The Federal District Courts In Nash-Finch Proceedings

This court has, over the past several decades, in a number of cases striven to delineate the borders of the public policy requiring that the National Labor Relations Act be administered primarily by the National Labor Relations Board. In general, this doctrine permits neither the federal nor the state courts to assert original jurisdiction over issues involved in a labor dispute which involve matters regulated by that federal Act. *Amalgamated Utility Workers* v. *Consolidated Edison Co. of N.Y.*, 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738 (1940); *Myers* v. *Bethlehem Shipbldg. Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). But where the limits of preemption begin and end often presents troublesome issues.

Such issues of preemption have normally come up through the respective state court systems, and have reached this Court by appeal through the state system and by writ of certiorari from this Court to the state courts of last resort. The key preemption decisions have been made in cases reaching this Court through that course. *Hill* v. *Florida*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed.

1782 (1945) (cert. to the Supreme Court of Florida); *San Diego Unions* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959) (cert. to the Supreme Court of California); *Garner* v. *Teamsters Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953) (cert. to the Supreme Court of Pennsylvania); *Weber* v. *Anheuser Busch, Inc.*, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546 (1955) (cert. to the Supreme Court of Missouri); *Teamsters Union* v. *Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed. 2d 312 (1959) (cert. to the Supreme Court of Ohio); *United Workers* v. *Laburnum Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954) (cert. to the Supreme Court of Virginia); *Machinists* v. *Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (1958) (cert. to the Dist. Ct. of Appeal of California, First Appellate District); *Plumbers' Union* v. *Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 (1963) (cert. to the Court of Civil Appeals of Texas); *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971) (cert. to the Supreme Court of Idaho); *Machinists* v. *Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed. 2d 396 (1976) (cert. to the Supreme Court of Wisconsin); *Sears Roebuck and Co.* v. *Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed. 2d 209 (1978) (cert. to the Supreme Court of California); *Farmer* v. *Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977) (cert. to the Court of Appeal of California, Second Appellate District).

Only one such case appears to have reached this Court through the federal, rather than the state judiciary. *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed. 2d 582 (1966) (cert. to the United States Court of Appeals for the Sixth Circuit) was a libel suit brought in Federal

District Court because of diversity and hence came to this court through the federal court system.

Processing these issues through the state court judiciaries is an orderly method of proceeding. With virtually every judiciary facing overcrowded dockets, there is no reason to assume that the state courts will seek to add federally preempted issues to their respective case loads. The state courts have no overweening desire to decide matters concerning the interpretation of a law the details of which are usually unfamiliar to them. In a few cases they may err. Murky areas such as those involving conduct "arguably protected" by Section 7 or "arguably prohibited" by Section 8 of the National Labor Relations Act, for example, may prove troublesome. But when the NLRB becomes aware of what it regards as threatened impingement, it may, perhaps jointly with the Solicitor General, file *amicus* briefs or memoranda to assist in clarifying the issues. It has done so in such cases as *Garmon, Laburnum, Weber, Linn,* and others.

This Court has also held that in an urgent case the Board may proceed in Federal District Court to enjoin a state court action preempted by the Act despite the anti-injunction provisions of 28 U.S.C. §2283. *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971). Where prompt action is essential and/or when a state court has not given proper deference to the preemption doctrine and has entered an order which may interfere with effective regulation of labor disputes by the Board, this injunctive route is available. Wisely, the Board has used it sparingly, thus leaving essentially inviolate the separate and distinct areas of primary responsibility of the state and federal judiciaries.

C. The Mass Picketing And Trespass Issues In The Instant Case Involve Questions of Preemption Which Should Have Been Decided In The First Instance By The Arizona Courts

The state courts of Arizona, in the proceedings instituted by the employer here, would and should have been called upon to decide issues of preemption. The state court complaint here contained allegations relating to mass picketing, violence, and trespassing. These posed the kinds of issues which have been the subject of litigation in such cases as *Sears Roebuck and Co.* v. *Carpenters, supra* and in *NLRB* v. *Nash-Finch Co., supra.* There is no reason to believe that the Arizona court would not have exercised proper judicial discretion in dealing with such issues or that it would not have observed proper lines between state and federal areas of primary jurisdiction. If it did not, then the Board had the *Nash-Finch* procedures available to it, if it became necessary to correct the state judiciary and to protect employees' statutory rights. If, on the other hand, there were issues of trespass and violence which properly fall within the state court's sphere, then whether such local law was violated was a matter for state court decision.

Instead, before the state court had even been given an opportunity to determine either the preemption issue or the local law issues, the Administrative Law Judge leaped into the fray and attempted to preclude the employer from even arguing before the state court either the proper bounds of that court's jurisdiction or the merits of the local law issues. If Administrative Law Judges are allowed to exercise such authority, it is unlikely that cases such as *Sears Roebuck and Co.* v. *Carpenters, supra,* would ever reach this Court!

That, we respectfully submit, is not an orderly approach to the doctrine of preemption or of judicial separation. It has the effect of permitting the Board to arrogate to itself the authority to decide both preemption issues and local law issues in the first instance, rather than leaving them to be decided by the judicial systems best equipped to deal with them in an impartial fashion. To allow such matters be decided in the first instance by Administrative Law Judges and by the Board is not a healthy practice. No regulatory authority, including the NLRB, is immune from the temptation to expand its area of authority, not out of impure motives, but only because of a wholly predictable sense of regulatory mission.

There was no compelling reason here for the Administrative Law Judge to usurp the authority properly vested in the Arizona state courts by deciding whether or not there was "reasonable basis" for the employer to seek relief from alleged trespass, violence, mass picketing, and libel. Petitioner's suit nowhere questions or attacks the right of the employees to have free access to the Board's procedures. Neither should the Board seek to block the petitioner's access to the state court on non-preempted issues. As a majority of the Board held in *Clyde Taylor Company*, 127 NLRB 103, 109 (1960):

> ". . . the Board should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than to condemn the exercise of such right as an unfair labor practice."

The Arizona state courts are, we submit, well qualified to decide whether there were aspects of the employees' conduct which were enjoinable under *Sears Roebuck*, or which might have justified the awarding of damages under

Laburnum. There is no reason to believe that the Arizona state court would not have observed proper jurisdictional and preemption lines, or that it would not have promptly dismissed the suit if the demonstration and picketing were shown to have come within the area of peaceful picketing exclusively regulated by the National Labor Relations Board and if the alleged libels failed the test of *Linn*. Indeed, after deliberation, the Arizona court vacated its temporary restraining order and refused to enter a preliminary injunction. Had the Arizona court entered any order which in the Board's view impinged upon an area reserved to the Board, as did the Nebraska court in the *Nash-Finch* case, the NLRB had available to it an expeditious route by which to seek to have any such order stayed.

But if, instead, there were areas, as in *Sears*, as to which the plaintiff-employer may have been entitled to a remedy before the state court, then the Administrative Law Judge of the National Labor Relations Board has no authority to preclude access to the only tribunals equipped to provide such a remedy—namely, the Arizona state courts. It is not sensible judicial administration to vest in an Administrative Law Judge employed by the National Labor Relations Board, the authority to decide either (a) whether the issues sought to be presented to state court are preempted, or (b) whether, if not preempted, the common or statutory law of the state of Arizona has or has not been violated, or (c) whether there is a colorable basis for such a common law or statutory claim under the law of the State of Arizona.

D. Primary Jurisdiction Over Clearly Non-Preempted Issues Should Be Left To State Courts, — With The Possible Exception Of Allegations Which In Essence Seek To Bar Access To Board Procedures by Claiming Abuse of the Board's Own Processes.

This Court has held that fundamental principles "require us not to find withdrawal from the States of power to regulate where the activity regulated was *a merely peripheral concern* of the Labor Management Relations Act." *San Diego Unions* v. *Garmon*, 359 U.S. 236, 243, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959). In *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed. 2d 582 (1966), this Court made clear that state courts continue to have jurisdiction to apply state common law to defamatory conduct, even though such defamation occurs in the context of labor relations normally governed by the National Labor Relations Act.

At the same time this Court devised certain safeguards and limited the role of state courts to remedying malicious libel—i.e. those cases where the defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity and where there was proof of actual damage. It can hardly be open to dispute, however, that the Court in the *Linn* case intended the state court to have original jurisdiction to determine whether the libel alleged in any given case is of the malicious kind falling within the permissible limits of state action. Surely there is no room in that decision for any suggestion that such determinations were intended to fall within the primary jurisdiction of the National Labor Relations Board, an agency with virtually no expertise in the law of libel. Yet that is precisely the impact of the decision here before this Court for review.

It would seem reasonable that in areas of primary and traditionally local concern, both because of the states' interest in such matters as the maintenance of domestic peace and because the federal interest in such matters is only peripheral, the National Labor Relations Board ought not attempt to preclude the state judiciary from deciding issues brought to it by its citizens.

That, indeed, seemed to be the initial approach of the Board, although the Board discussed it without so specific a reference to preempted or non-preempted issues. *Clyde Taylor,* 127 NLRB 103 (1960).

Commencing, however, with *Power Systems, Inc.,* 239 NLRB 445 (1978), enforcement denied, 601 F.2d 936 (7th Cir. 1979), the NLRB embarked upon a new and questionable practice of attempting to preclude employer and/or union access to the state courts if resort to the state courts appeared to the Board to be for the purpose of penalizing an employee for filing a charge with the Board. Id. at 450. The Board has also sought to preclude access to the state courts if the object of the litigation is in itself unlawful, such as the enforcement of a hot cargo or invalid union security clause. *United Stanford Emp., Etc.,* 232 NLRB 326 (1977), enforced 601 F.2d 980 (9th Cir. 1979); *Television Wisconsin Inc.,* 224 NLRB 722 (1976).

The NLRB has also attempted to preclude access to the state courts when the state court suit was found to attack the very basis of the charge being determined by the Board or the basis for a contempt proceeding instituted by the Board. *George A. Angle,* 242 NLRB 744, enforced 683 F.2d 1296 (10th Cir. 1982). See also *Sheet Metal Workers Local 355,* 254 NLRB 773 (1981). To the same effect is *The United Credit Bureau of America, Inc.,* 242 NLRB 921

(1979), enforced 643 F.2d 1017 (4th Cir. 1981), cert. denied ..... U.S. ....., 102 S.Ct. 539, 70 L.Ed. 2d 404 (1981) (Rehnquist, J. dissenting in a written opinion).

In the *United Credit* case, the employer had sued the employee in a fraud action, alleging that the employee had provoked her own discharge so that she could file an unfair labor practice charge in the expectation that the employer would offer a settlement which would amount to a "paid vacation." The complaint alleged that her entire course of conduct was an effort by the employee to obtain the benefits of the employer's training program although she had no intention of remaining a *bona fide* employee. The court and the Board characterized the employer's action as analagous to an action for abuse of process. Essential to the alleged fraudulent scheme was provocation of her discharge by engaging in arguably protected activities and her resort to the NLRB for appropriate relief. Thus, said the court, the employer had "inexplicably wedded its fraud action to the operation of the Board's processes." In discussing the matter of the appropriate forum under these circumstances, the court concluded (p. 1026):

> "In cases of the class before us — employers' civil actions against employees, in the nature of abuse of process and factually based upon the employee's filing of unfair labor practice charges with the Board — all factors require resolution of the employee's unfair labor practice claims in the first instance by the Board. We believe that the Board is uniquely positioned to determine fairly and with presumed expertise whether Anderson was engaged in protected lawful activity, or whether she was abusing the Board's processes as alleged."

This Court denied certiorari in that case, with Justice Rehnquist dissenting.

Power Systems, Inc., supra was the first case in which the Board began carving out exceptions to the *Clyde Taylor* doctrine. The above quoted rationale of the Fourth Circuit in *United Credit* probably tacitly underlay the Board decision and the court's approval there. In that case the employer had sued the employee for malicious prosecution on the grounds that the employee had repeatedly filed groundless charges against the employer. The Board there found that the employer's civil action was baseless and had been brought in order to "pursue an unlawful objective of penalizing" the employee for filing an NLRB charge. The court denied enforcement on the ground that the Board's conclusion that the civil action was baseless was not supported by substantial evidence.

Similarly in *George A. Angle, supra,* the Court of Appeals found it appropriate to enforce a Board order prohibiting the pursuit of a state court malicious prosecution suit. The court there did not make specific mention of the Board's presumed expertise to decide abuse of process questions involving its own processes, although such rationale would have had equal application there. While the Court's decision offers only minimal analysis of the basic issues we have been discussing, it emphasized in footnote 2 at page 1300, "the congressional intent that employees enjoy 'complete freedom' to report unlawful conduct to the Board," and found that such a policy would be "ill-served by a policy that permitted a civil action to proceed to resolution before the Board could determine that the action violated the Act and order appropriate relief."

Because these cases involve non-preempted areas of state law, it would seem the more orderly course to permit the state court to decide such non-preempted issues (malicious prosecution in *Power Systems* and *George A. Angle,* fraud in *United Credit*). Yet it appears that this Court, by denying certiorari in *United Credit,* has accepted the rationale that state court actions challenging the legitimacy of the employee's or union's charges filed with the NLRB pose, essentially, questions of alleged abuse of NLRB processes. In this limited area, apparently this Court is willing to presume that the NLRB has unique expertise. And it may be sound federal labor policy to permit the Board to keep primary jurisdiction over reviewing the basis of the charge, rather than to allow a state court to make a decision which could preclude or discourage the employee from invoking Board processes at all. There is at least an arguable reason in such cases to allow the NLRB to make the initial decision as to whether the state court is being used without reasonable basis as a means of denying access by employees to the Board's processes.

We believe the better doctrine would have been to keep the NLRB completely out of the area of determining whether the parties should have access to the state's judicial processes, as Justice Rehnquist opined in his dissent in the *United Credit* case.

But if there is to be this one exception to the rule that non-preempted issues are best left to state courts for determination, let that exception be finely drawn and narrowly construed. Such an exception would not permit the Board to attempt, as it did here, to deny access by the employer-plaintiff to a state court for determination of a

libel issue. An Administrative Law Judge should not be authorized to decide whether or not there was a colorable or *prima facie* basis for a libel suit of the non-preempted *Linn* variety. That is a decision for the state courts to make, not the Board. Parties should be allowed to seek a decision in the judiciary best equipped to decide such issues of local law. That judiciary is the Arizona courts, not an administrative agency charged with administering the nation's labor laws.

E. Effective Judicial Administration Will Not Be Well Served If The Board Is Permitted To Attempt To Impede Access To State Judiciaries

As a matter of practicality, as well as principle, it makes little sense to permit the National Labor Relations Board to attempt to deny any party access to state courts. The result of so doing would be only to create uncertainty for long periods of time.

As this Court well knows, the Congress has provided a three step decision making process for the interpretation and enforcement of the National Labor Relations Act. The statute requires that an unfair labor practice proceeding be decided in the first instance by an Administrative Law Judge, who has authority only to enter a recommended order. That order is then subject to review by the Board, but the Board's order is also not self-enforcing. Only when a United States Court of Appeals enforces the Board's order is there a final decision with teeth in it.

This rather tentative enforcement process results in substantial delays. The median time from the filing of a charge to the issuance of an NLRB decision was 429 days

in 1978, and 483 days in 1979. Miller, *An Administrative Appraisal Of The NLRB*, Table 4, p. 146, published by the University of Pennsylvania (Revised Edition 1980). The time from Board decision to court order varies, of course, with the complexity of the case, but on the average takes approximately a year after the Board commences its enforcement proceeding (*Id.* page 103).

If, therefore, the Board's General Counsel accuses a respondent employer of commiting an 8(a)(1) violation by having filed suit against an employee or a union in a state court, there will be no enforceable decision with respect to that accusation for over two years. Meanwhile, the state court action may well have proceeded to a conclusion, and a state court judgment enforceable in that judicial system may well have been entered.

In the instant case the court action was commenced by the employer on September 25, 1978. The Court of Appeals decision in the Ninth Circuit was handed down on November 12, 1981—over three years later. If a state court suit is improper because it is within an area of law which has been federally preempted, or if the state court action has denied the state court defendant access to Board processes, then surely it is not effective judicial administration to have such an important matter remain in limbo for a period of some two to three years, during which time the state court may have proceeded to final judgment.

It seems obvious that it is much more appropriate to have questions of preemption or of misuse of state court processes be litigated in the state court proceedings, either by the parties themselves or, if necessary, with the assistance of NLRB intervention either as a party or as a

friend of the court. Such a procedure assures that alleged limitations on the state courts' jurisdiction may be raised before the court reaches its decision.

In extreme cases a state court order may also be subject to stay through the Board's utilization of the federal court's injunctive powers as authorized by this Court in *Nash-Finch*. That, too, unlike the Board's procedures, offers a timely and effective means of preventing unwarranted state action in an appropriate case.

To permit such issues to drag through the NLRB's slow and tentative multi-step decision-making procedures, however, is not merely disruptive of the appropriate distribution of judicial powers, as we have pointed out in earlier sections of this brief. It is also highly ineffective judicial administration. In cases where prompt action is necessary in order that a state not intrude improperly into a federally regulated area, there are better means available than an attempted utilization of the labor act's cumbersome unfair labor practice remedial machinery.

CONCLUSION

The Board's order enforced here by the Ninth Circuit Court of Appeals exceeds the permissible bounds of attempted administrative interference with free access to the state courts of Arizona. Those courts, not a federal regulatory agency, must be left with original jurisdiction to decide issues of trespass, violence, mass picketing, and malicious libel. The Board's order requiring petitioner

to withdraw its suit in the Superior Court of the State of Arizona should be denied enforcement.

Respectfully submitted,

.....

EDWARD B. MILLER
Room 3200
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4223
Attorney of Record for the Chamber of Commerce of the United States, as Amicus Curiae

MATTHEW R. MCARTHUR
With Him on the Brief

Of Counsel:
POPE, BALLARD, SHEPARD
& FOWLE, LTD.
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4200

STEPHEN A. BOKAT
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

December, 1982

NO. 81-2257-CFX	TITLE	Bill Johnson's Restaurants, Inc., Petitioner v. National Labor Relations Board, et al.

DOCKETED	COURT
May 28, 1982	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Lawrence Allen Katz
	Counsel for Respondents: Solicitor General
May 28, 1982	Petition for writ of certiorari filed.
July 9, 1982	Order extending time for all respondents to file a response to the petition until Aug. 7, 1982.
Aug. 9, 1982	Order further extending time to file a response to the petition until Aug. 13, 1982.
Aug. 13, 1982	Brief for respondent, NLRB, in opposition filed.
Sept. 1, 1982	DISTRIBUTED. SL23P1.
Sept. 3, 1982	Reply brief for the petitioner filed. (D).
Oct. 4, 1982	REDISTRIBUTED. 10-8.
Oct. 12, 1982	REDISTRIBUTED. 10-15.
Oct. 18, 1982	Petition GRANTED.

Dec. 3, 1982	Brief, amicus curiae, of the Chamber of Commerce of the U. S. filed.
Dec. 6, 1982	Joint appendix filed.
Dec. 6, 1982	Brief for the petitioner filed.
Dec. 21, 1982	Order extending time to file the respondents' brief on the merits until Jan. 20, 1983.
Jan. 28, 1983	Brief for respondent, NLRB, filed.
Jan. 31, 1983	Motion of American Federation Of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
Feb. 15, 1983	CIRCULATED.
Feb. 22, 1983	The motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae is GRANTED.
March 16, 1983	Reply brief for the petitioner filed. (D).
March 29, 1983	ARGUED.